SHIPPING ACT AMENDMENT OF 1977

HEARINGS

BEFORE THE

SUBCOMMITTEE ON MERCHANT MARINE AND TOURISM

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

UNITED STATES SENATE

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

S. 2008

TO AMEND THE SHIPPING ACT, 1916, TO PROVIDE FOR A 3-YEAR PERIOD, TO REACH A PERMANENT SOLUTION OF THE REBATING PRACTICES IN THE UNITED STATES FOREIGN TRADE

OCTOBER 12 AND 13, 1977

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CONTENTS

CHRONOLOGICAL LIST OF WITNESSES

OCTOBER 12, 1977

OCTOBER 13, 1977

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

SHIPPING ACT AMENDMENTS OF 1977

WEDNESDAY, OCTOBER 12, 1977

U.S. SENATE,
SUBCOMMITTEE ON MERCHANT MARINE AND TOURISM,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, D.C.

The subcommittee met at 9:30 a.m., in room 5110, Dirksen Senate Office Building, Hon. Daniel K. Inouye (chairman of the subcommittee) presiding.

OPENING STATEMENT OF SENATOR INOUYE

Senator INOUYE. The committee will please come to order.

Before proceeding, I would like to make an announcement. Due to a scheduling conflict, the hearings scheduled for tomorrow will commence at 10:15 a.m. instead of 9:30 a.m. as originally scheduled.

Shortly after I assumed the chairmanship of this subcommittee, I publicly explained in some detail the legislative program this subcommittee intended to pursue in an attempt to restore the American merchant marine to what I consider to be its proper position in the maritime world.

The International Economic Report of the President which was transmitted to Congress in January of this year stated that despite innovations introduced by the U.S. maritime industry in recent years and the financial assistance provided to it by the Federal Government, the U.S.-flag merchant marine fleet ranks 10th in size among the national fleets of the world and accounts for only a small fraction of the world fleet.

The report went on to say that the share of U.S. foreign trade tonnage carried by U.S. vessels in 1976 is approximately 17 percent less than in 1970 and that the percentage of commercial cargo carried in U.S. oceanborne foreign trade by U.S.-flag ships was a mere 4.4 percent in 1976 as compared to 42.3 percent in 1950.

As an Nation, therefore it is obvious that we are woefuly inadequate to assure an American shipping capability ready and able to serve our international economic, military, and political commitments under all foreseeable circumstances.

We know from experience that even in times of peace, economic and political tensions abroad, and other unforeseen contingencies, may seriously disrupt or distort traditional patterns of commercial intercourse on international trade routes.

When this occurs, an international power such as the United States cannot be dependent upon ocean transportation media owing allegiance to alien flags without threatening its national security. I think at this juncture it may be well that we remind ourselves of what happened to us when we called upon American citizens owning ships on the flags of convenience to assist the national effort to aid Israel in the Yom Kippur war and its aftermath. The shipowners, American citizens, were told by the Liberian President that carrying military cargo to Israel would be considered an unfriendly act, and if they did so, their ships would be taken off the registry, and the record would indicate that not one single American citizen responded to the plea of the U.S. Government. That is what can happen to us.

We also understand that our economic security is vitally linked to our maritime independence.

Unless the precipitous decline of our merchant marine is halted, we stand in peril of becoming victimized by this appalling circumstance.

At the time I outlined the subcommittee's program, I also said in my opinion there is nothing more urgent and vital to remedy the situation than an effective and permanent solution to the problems caused by illegal rebating and other malpractices which have been widespread throughout our ocean liner trades for over one-half a century.

To that end, I said the subcommittee would begin an investigation to seek a solution, and accordingly in March, this subcommittee began its deliberations with 2 days of preliminary hearings.

Among those submitting testimony were the Chairman of the Federal Maritime Commission (FMC), the representatives of United States and foreign flag carriers, representatives of the neutral self-policing authority, and the president of the Transportation Institute, a non-profit research organization composed of 130 member companies operating in our Nation's international and domestic shipping trades.

Representatives of other Government agencies were invited to testify at that time, but for whatever reasons they did not do so.

It was especially regrettable that the Departments of Justice and State did not appear.

There is substantial criticism that over the years the policies, actions, and inactions of the Department of Justice have frustrated our national shipping policy and discriminated against U.S.-flag carriers. These, of course, are serious allegations and, if accurate, explain in part the woeful state of our shipping capability.

There is also serious criticism that the Department of State has failed to discharge its responsibilities to further our national shipping policy.

Both these agencies of Government will appear this morning, however, and their testimony will be most welcome.

During the March hearings, the then chairman of the FMC stressed the urgency for action because the Commission's powers had been relatively ineffective in getting at rebating and other malpractices.

It is, I believe, fair to say that the other witnesses agreed with this assessment. There was, however, no consensus on the course of action to take and many, many suggestions were made.

Making a solution of the problem even more elusive is the serious question of whether any sanction can be effectively enforced inasmuch as many of our trading partner countries legally permit what our laws

prohibit, such as illegal rebating, and many of them also have laws which forbid their flag carriers from producing documents and otherwise complying with enforcement efforts of our responsible Federal agencies.

From the expert testimony it was apparent that there was no simple one step solution to the problem. Its causes were too diverse.

During the hearings therefore I suggested, as a first step, the possibility of legislation to require liner carriers in our ocean commerce to comply with our laws by agreeing to produce documents and information when legitimately sought by the FMC when it was investigating malpractices.

My immediate purpose was to set up a mechanism which would enable FMC and therefore the Congress to gather the information necessary to deal effectively and conclusively with the problem of rebating and other malpractices.

It is, I believe, accurate to say that my suggestion met with general agreement from the witnesses.

Upon conclusion of the hearings I directed the subcommittee staff to draft legislation which, while recognizing the problems that had been highlighted, would provide an effective means for finding a solution to rebating and other malpractices.

Accordingly, on August 4, S. 2008 was introduced, and I believe that this bill will provide such an approach. Its principal features are:

First, the requirement that any common carrier by water in the foreign commerce of the United States, or any shipper, consignor, consignee, forwarder, broker, or other person subject to the Commission, must respond fully to an FMC order of hearing and investigation to determine whether such carrier or its agent is, or seeks to engage in, rebating or other malpractices in foreign commerce in violation of specified provisions of the Shipping Act of 1916.

Failure to respond fully includes the failure to comply with depositions, written interrogatories, discovery procedures, and subpoenas.

Upon failure to respond fully by the carrier, the FMC is directed to suspend all of its tariffs filed pursuant to section 18 of the Shipping Act, and all vessels of the carrier shall be denied entry to any U.S. port until the carrier has responded.

Second, a provision for a year period within which any person who has given or received a rebate in violation of the Shipping Act of 1916 prior to enactment of the legislation may disclose such fact to the FMC, and receive immunity from any criminal prosecution which is premised on the violation of the Shipping Act which the person disclosed to the FMC.

Provided, however, that such disclosure is made prior to the time such person had actual notice that it was the subject of an investigation relating to that violation by any agency of the Federal Government. I would propose that this section on actual notice be amended because the fact that this measure is now under consideration might be construed as being actual notice and it might, as a result, fail to carry out the intent of the authors of the measure. The civil penalty which would have been attached for the violation will be attached if the person subsequently engaged in rebating or other malpractices.

Third, a requirement that the FMC, within 18 months of the enactment of the bill, report to the Congress on the results of the rebating disclosures encouraged by the amnesty provision, together with the agency's recommendations for corrective action.

Fourth, an express provision that nothing in the amnesty provision of the legislation shall be construed to abrogate or rescind any civil penalties under any agreements now signed with the United States pursuant to Public Law 94–216.

Among other things, this provision is intended to assure that the legislation is in no way intended to mitigate or otherwise affect the settlement agreement between Sea-Land Service, Inc., and the FMA under which Sea-Land disclosed information and details on what the Commission believed to be violations of the Shipping Act of 1916, and agreed to pay a monetary penalty of $4 million, with a right to petition the FMC for mitigation or modification.

Fifth, a provision that the amendments made to the Shipping Act of 1916, by legislation shall expire 3 years from the effective date of enactment of the legislation unless otherwise extended by law.

This legislation will, I believe, enable the FMC and the Congress to gather the information necessary to deal effectively and conclusively with a most serious threat to our merchant shipping.

By closing our ports to those carriers who fail to cooperate with FMC investigations and legislation will, I believe, enable the Commission to overcome one of the most serious barriers to finding a solution to the rebating problem; that is, cooperation by all, not just Americans, who engage in our liner trades.

The amnesty provision is intended to encourage everyone who has been involved in rebating to come forward and disclose the nature and extent of their activities. This too should greatly assist the FMC in acquiring the necessary information to make appropriate recommendations to the Congress.

All government agencies having responsibilities in this matter as well as industry representatives will testify on the rebating situation in our foreign trades, and the potential of a bill such as S. 2008 to remedy the situation.

I would like to stress that this measure is not a definitive solution to the problems of rebating and other malpractices. Rather, I look upon this as an interim step intended to provide the mechanism for Congress, with the assistance of the FMC and other Federal agencies having responsibilities in the matter to determine how ultimately to solve the problem.

I would also emphasize that neither the approach nor the language of this measure is conclusive and, therefore, the subcommittee will welcome any recommendations for change.

[The bill follows:]

95TH CONGRESS
1ST SESSION

S. 2008

IN THE SENATE OF THE UNITED STATES

AUGUST 4 (legislative day, JULY 19), 1977

Mr. INOUYE introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

A BILL

To amend the Shipping Act, 1916, to provide for a three-year period, to reach a permanent solution of the rebating practices in the United States foreign trade.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Shipping Act Amendments of 1977".

SEC. 2. Section 22 of the Shipping Act, 1916 (46 U.S.C. 821) is amended as follows:

(a) Designate the two existing paragraphs as (a) and (b), respectively.

(b) Strike out "That", in subsection (a), as designated

by this Act, and insert in lieu thereof "Except as provided in subsection (c), that".

(c) Immediately after subsection (b), as designated by this Act, insert the following:

"(c) (1) Notwithstanding any other provision of this Act relating to the investigation of complaints of violations of this Act, whenever the Commission receives a complaint by any person of a violation of section 16 (other than paragraphs First and Third) in foreign commerce, or section 18(b), then the Commission shall, with thirty days after the date it received such complaint, issue an order of hearing and investigation to determine whether such violation has occurred or is occurring, except that if the Commission deems the complaint to be insubstantial it shall, without a hearing or further investigation, deny the complaint in writing stating the reasons for the denial. The Commission may upon its own motion, without such a complaint, issue an order of hearing and investigation pursuant to this subsection to determine whether any person has violated or is violating section 16 (other than paragraphs First and Third) in foreign commerce or section 18(b) of this Act. Within one hundred and eighty days after the date of the issuance of such an order of hearing and investigation, the Commission shall issue a final order in the proceeding or the Commission shall issue an interim order stating in full why it could not issue

a final order and establishing the period within which it shall issue a final order.

"(2) Failure on the part of any person, respondent to a proceeding instituted pursuant to subsection (c) (1), to comply with depositions, written interrogatories, discovery procedure, or subpena issued in relation to an investigation or hearing held under an order issued by the Commission under subsection (c) (1) shall:

"(A) Toll the time within which the Commission shall issue a final order as provided in subsection (c) (1). The Commission shall immediately suspend, without hearing, all tariffs filed pursuant to section 18 of this Act by, or on behalf of, a respondent carrier or any carrier directly or indirectly owned, controlled, or affiliated with that respondent carrier, and the vessels of that respondent carrier shall be denied entry to any United States port until that respondent carrier has fully responded to the deposition, written interrogatories, discovery procedure, or subpena involved, and the Commission has issued its order in the proceeding. Vessels of that respondent carrier in voyage shall be permitted to enter United States ports for the purpose of discharging cargo notwithstanding that the carrier's tariff has been suspended. Any carrier whose tariffs have been suspended pursuant to this subparagraph, and who provides

more than $50,000, for each such violation. The penalty provided in this paragraph shall be in addition to the penalty provided in paragraph (2).

"(4) Within eighteen months after the effective date of this subsection, the Commission shall report to the Congress the results of the disclosures made under paragraph (1), together with its recommendations for corrective action.

"(5) Nothing in this subsection shall be construed as abrogating or rescinding any civil penalties under any agreements now signed with the United States under section 3 of the Act of August 29, 1972 (making amendments to the Shipping Act, 1916).".

SEC. 4. The provisions of this Act, including the amendments made by this Act, shall become effective immediately upon its date of enactment and, together with any rules and regulations promulgated to implement the amendments made by this Act, shall expire three years after such date of enactment unless otherwise extended by Act of Congress.

Senator INOUYE. This morning our first witness is the Chief of the Admiralty and Shipping Section of the Civil Division of the Department of Justice, Lawrence F. Ledebur.
Good morning, sir, and welcome to the committee.

STATEMENT OF LAWRENCE F. LEDEBUR, CHIEF, ADMIRALTY AND SHIPPING SECTION OF THE CIVIL DIVISION, DEPARTMENT OF JUSTICE; ACCOMPANIED BY B. FRANKLIN TAYLOR, JR., DEPUTY CHIEF, GOVERNMENT REGULATIONS AND LABOR SECTION, CRIMINAL DIVISION; AND DONALD FLEXNER, CHIEF, REGULATED INDUSTRIES SECTION, ANTITRUST DIVISION

Mr. LEDEBUR. I am Lawrence Ledebur, Chief of the Admiralty and Shipping Section of the Civil Division, Department of Justice. I am accompanied today on my left by Mr. B. Franklin Taylor, Jr., Deputy Chief of the Government Regulations and Labor Section of our Criminal Division, and Donald Flexner, Chief of the Regulated Industries Section of our Antitrust Division.

I am pleased to be here today to present the views of the Department of Justice on S. 2008, a bill "to amend the Shipping Act, 1916, to provide for a 3-year period to reach a permanent solution of the rebating practices in the United States foreign trade."

The Department's recent experience under the antirebating law has been that the FMC has referred two rebating cases to us this year. They were promptly put into suit. We would expect to act similarly on any future referrals that the Commission may make.

The Department of Justice favors efforts to end rebating and other illegal practices prohibited by the Shipping Act. In principle, it also has no objection to the basic policy embodied in the proposed amendments to encourage voluntary disclosures of past violations and avoidance of future violations.

However, we defer to the Department of State as to the desirability of section 2(c)(2)'s interdiction from Amreican trade of carriers refusing to cooperate with Commission investigations. The Department of Justice is not able to assess the possible effect of that sanction on our foreign relations nor the likelihood of retaliation by foreign governments against American carriers.

And we are seriously concerned with certain language in section 3, specifically with that beginning on page 4, line 23, and ending on page 5, line 4. Such language would seem to immunize persons voluntarily disclosing enumerated violations of the Shipping Act from any and all criminal prosecution, not only under the Shipping Act, but under any criminal statute. Thus, for example, a person under investigation for violation of our income tax or security exchange laws, or for any of a number of crimes which might directly or indirectly be related to a violation of the Shipping Act, could seemingly avoid prosecution by voluntary disclosure of his Shipping Act violation pursuant to this bill, even if his non-Shipping Act crimes were fully documented and he was about to be indicted, as long as he did not have "actual notice" that he was under investigation.

It is our view that such blanket immunity is too high a price to pay, especially when Federal authorities already have gathered evidence of a criminal violation.

Accordingly, we urge that this subcommittee consider deletion of the language under discussion.

That concludes my prepared statement, Mr. Chairman. My colleagues and I would be glad to answer any questions.

Senator INOUYE. Mr. Ledebur, are you familiar with the maritime policy of the United States?

Mr. LEDEBUR. Generally, I think so, sir.

Senator INOUYE. And you would consider the statutes implementing that policy to be the law of the land, wouldn't you?

Mr. LEDEBUR. Definitely.

Senator INOUYE. Do you believe that the Department of Justice has implemented this law of the land?

Mr. LEDEBUR. I have no reason to think otherwise, sir.

Senator INOUYE. Being the head of the Admiralty and Shipping Section, I would presume that you are aware of the status of the U.S. merchant marine today?

Mr. LEDEBUR. Very definitely, Senator.

Senator INOUYE. I think the record should show at this time that we have six passenger cargo ships—these are in active operation—134 freighters, 16 bulk carriers, 238 tankers, and 143 intermodal; a total of 537. I'm certain you are aware that in 1950 and just prior to that we were No. 1 on the high seas.

Mr. LEDEBUR. I am, sir.

Senator INOUYE. And I think at that time our freight equaled about 120 million tons. Today we are, according to the best estimate—and that's the International Economic Report to the President of the United States—we are No. 10. Is it of any concern to you that we have dropped to No. 10.

Mr. LEDEBUR. It is indeed.

Senator INOUYE. Should it be of any concern to us that the Soviets in 1950 ranked No. 24, I believe, or 23, and today are No. 6?

Mr. LEDEBUR. I think it should be.

Senator INOUYE. And I think if the growth rate continues they could be No. 1 in a few short years. Are you concerned with the activities of the Far East Steamship Co. in the Pacific and the Baltic Steamship Co. in the Atlantic?

Mr. LEDEBUR. Not in my official capacity, sir. Perhaps I should explain that within the Department of Justice responsibility for maritime affairs is not centralized in my section. The Admiralty and Shipping Section is a trial section. Our sole official contact with, for example, the Shipping Act of 1916 is to prosecute for civil penalties such matters as are referred to us by the Federal Maritime Commission and to assist the Commission when necessary by obtaining court enforcement of admiralty discovery and subpena activities.

On the other hand, where appeals to the courts are taken from final orders of the FMC, it is the Antitrust Division's responsibility to represent us, and of course, prosecution of criminal violations of the act are the responsibility of the Criminal Division.

Senator INOUYE. According to our committee records, we received a copy of your testimony on September 28, and this testimony had the following:

It is our view that such blanket immunity is too high a price to pay, especially when Federal authorities have already gathered evidence of a criminal violation. Accordingly, we urge that this committee consider deletion of the language under discussion and instead substitute a form of use immunity for persons making voluntary disclosures pursuant to section 3. One possible form of such substitution could be as follows: such a good faith disclosure to the Commission or information obtained by the exploitation of such good faith disclosure shall not be used against any such person in any criminal case except the prosecution for perjury or for giving a false statement.

Last evening at about 5:30 or 6 o'clock, the Department advised the committee staff that this was no longer the Department's position. Can you explain to us why this change at the last minute?

Mr. LEDEBUR. That was at the request of the Criminal Division, sir, and I would ask Mr. Taylor to answer that question.

Mr. TAYLOR. Senator, when we first received a copy of S. 2008 to look at in the Criminal Division, we had a very short deadline in which to give our views, like by the close of business the same afternoon. We looked over the bill and immediately saw the amnesty provision and were very gravely troubled by it because it was a blanket amnesty, and it would appear that if anybody made disclosure to the FMC without actual notice that there would be investigations by any agency or grand jury or whatever, it would receive amnesty for any violations which may stem from the rebating practices, including, of course, income tax violations, which is a rather obvious one frequently involved, violations of the Currency and Foreign Transactions Reporting Act, possible violations of the Securities and Exchange Act, and possibly other violations which may be potentially involved.

So we got in touch with Mr. Ledebur, who was going to testify on the bill, and told him our troubles with that provision, and ultimately there was proposed this use immunity as a better alternative certainly than the blanket immunity presently in the bill.

Subsequently, we had conversations with the U.S. attorney's offices that were conducting investigations and got some rather strong protests about any kind of immunity provision on the grounds that there have perhaps already been some disclosures made in connection with grand jury investigations now ongoing, disclosures which were also made to the Maritime Commission, which may have an impact on whatever the grand jury is doing should indictments subsequently be forthcoming, and it would, to say the least, complicate the matters, if not have a more serious impact than that.

Senator INOUYE. Doesn't this bill have a prospective effect?

Mr. TAYLOR. Well, as I understand the language of the bill, disclosures that are made now would have attached to them the amnesty. There is nothing in the bill that says disclosures made after the date of enactment of this bill, and certainly if any amnesty provision were provided, we would strongly suggest that that be done.

Senator INOUYE. In other words, you're not totally against amnesty but with certain changes you would be for it?

Mr. TAYLOR. We had further discussions when these matters were brought to our attention, and ultimately the position that was taken in the Criminal Division was that we would prefer to have no amnesty provision; that in any event it should go no further than to forgive violations of the Shipping Act itself; and that, at the very least, it should be prospective in its effect.

Senator INOUYE. Well, let's put it this way. According to testimony we have received, it has been suggested by knowledgeable people that malpractice in the industry is widespread—that very few, if any, shipping companies are immune from this, the only difference being the degree of violations.

Mr. TAYLOR. Yes, sir.

Senator INOUYE. So you're talking about numerous shippers, carriers, and so forth—hundreds of them—involved in some degree of malpractice, not just rebating. In the last 5 years, how many cases have you prosecuted?

Mr. TAYLOR. Since the act was amended some few years back, there are only approximately three possible violations under the act that take criminal penalties. I believe it's paragraphs first and third of section 815 of title 46 and section 14 of the act. We have had very little. We have had, I would say, in the last 2 or 3 years perhaps three prosecutions. There have been very few.

Now, there may have been many more than that number of civil penalty cases, and of course, we are all aware that the Maritime Commission has recently, with Sea-Land, compromised a very broad violation or series of violations with civil penalties, and I understand from reading the testimony that I have seen of Mr. Daschbach, the chairman of the FMC, that he anticipates that they will be able to do much more through their own existing procedures in dealing with the problem. Now, whether they will be able to deal with most of it or a smaller portion, I don't know.

Senator INOUYE. If I'm not mistaken, the *Sea-Land* case was a situation where the company voluntarily came forth.

Mr. TAYLOR. Yes. It was also under grand jury investigation, and I can't say which was first, the chicken or the egg, in this instance; but it didn't happen in a vacuum, and there are still grand jury inquiries going on which involve rebating involving Sea-Land and other shippers.

Senator INOUYE. So you have had three prosecutions in the last 2 years. How many foreign companies have you charged?

Mr. TAYLOR. I don't know, Senator. I must say that prosecutions under the Shipping Act are a very, very minor part of the business of my section. Generally we get our cases on referral from the FMC. They haven't had occasion to refer very many, I think primarily because so many of the violations of the act are handled by civil penalties. I believe it's an adequate way of dealing with the violations, and it reduces to a relatively small number those which are subject to criminal prosecution. I couldn't say which ones are foreign or domestic. We take the cases as we get them. There are few, and I'm just not sure.

Mr. LEDEBUR. Senator, if I could interject here, the two cases I referred to in my statement are the only rebate cases that have been sent to the Civil Division by the Commission in my memory, which is some 20 years. Those two cases, however, happen to involve two separate liner or conference liner operations whose majority of members are in foreign shipping. So we do presently have now three suits covering those two cases pending in the United States.

Senator INOUYE. Involving foreigners?

Mr. LEDEBUR. Involving foreign owners—German, Spanish, Italian—I can't recall some other nationalities perhaps.

Senator INOUYE. How have these foreign companies cooperated with you?

Mr. LEDEBUR. We are at an early stage of the litigation. We just got the cases late this spring or early summer. The Italian I understand is in some form of Italian bankruptcy. One of them is contesting adequacy of service. No discovery has been undertaken as yet, sir.

Senator INOUYE. I'd like to come back to that, if I may.

In your statement, sir, you have indicated concern with the language of the disclosure and the immunity section. You say someone who has voluntarily disclosed information would be immunized from all criminal prosecution, "not only under the Shipping Act but from other criminal statutes," and you cite violations of the tax laws or the securities and exchange law which might directly or indirectly be related to violation of the Shipping Act.

I would like to say that I don't necessarily agree or disagree with the position, but I would point out to you that the language the department suggested in the testimony it first submitted applies to any criminal case. So it would seem to me that language would apply to other violations of law such as income tax or SEC violations. The first statement would clarify this, would it not?

Mr. LEDEBUR. The first statement would have prohibited for example, the Criminal Division from making use of any information voluntarily disclosed to the Commission in a criminal prosecution for violation of some other statutes.

Senator INOUYE. I don't want to make the amnesty provision broader than is necessary to accomplish its purpose; but that's why we are having these hearings and we are asking professionals.

Mr. LEDEBUR. We do feel that the language as it is now in the act would be a blanket immunity.

Senator INOUYE. But you're now withdrawing your suggestion?

Mr. LEDEBUR. That is correct, sir.

Mr. TAYLOR. Senator, if I may, the use immunity would be greatly to be preferred over the existing. That is the language proposed in the statement of the proposed testimony before it was modified. That is a use immunity in that testimony. The disclosures made to the Commission could not be used in any prosecution, but it doesn't mean you couldn't prosecute for the same act provided you don't use or exploit those disclosures and that's definitely to be preferred over the existing amnesty provision which means you couldn't prosecute for related acts.

But we are concerned even about the use immunity, even though we would definitely prefer it to what's in the bill at the present time, because you get into very ticklish questions of whether a prosecution was in any way based on an exploitation of disclosures. You have to make a very strong showing that your case, your tax case for example, was based entirely upon independent evidence. Not only did you not use the disclosures but the disclosures didn't even give you a hint as to where you could look for further evidence. Sometimes that's a very hard line to draw, especially if this provision were retroactive and there are investigations ongoing in which disclosures have been made.

Also, the present immunity provision which has general application is found in title 18. I'm sure you're acquainted with sections 6001, et cetera, which deal with court ordered testimony pursuant to immunity

either before grand juries or trials or indeed before administrative hearings or on the Hill in the committee hearings. That's the general use immunity provision which has general application and that has very stringent safeguards. One doesn't automatically get immunity if the FMC would wish to immunize somebody or if a U.S. attorney would wish to immunize somebody or the Antitrust Division in connection with one of its investigations would immunize somebody. The Criminal Division has to concur and that is to insure that immunziing that person wouldn't impinge on an already existing investigation. The whole matter has to be approved by the Attorney General or one of his limited number of delegates. So it isn't lightly given and there are safeguards. If we have an immunity provision in the bill such as this, or in others, where use immunity occurs automatically, while it's preferable to the blanket immunity, it still doesn't have quite those safeguards; and we can find that an immunity is secured and there's a serious question whether disclosures were indeed exploited, or at least it's arguable, and it's hard to show that they were not exploited.

And what is actual notice actually? Because unless one has actual notice of investigation, he would get—the carrier or the shipper would get the immunity. What is meant by actual notice? Does it have to be formal notice or might it be a rumor or general knowledge in the trade or a witness before a grand jury saying, "Look, they asked me questions about you, X carrier." Is that actual notice?

I notice in the Sea-Land testimony, which I skimmed briefly this morning, they are suggesting that the whole industry has actual notice that they are under investigation; hence I assume they are suggesting you eliminate the notice provision, which I would find very unpalatable. I think it's a difficult question. In essence, we would prefer no amnesty. If there is one, we would prefer it to be confined to violations of the Shipping Act. We would certainly prefer that it be made prospective, that it would only come into being from the date of passage of this or some successor bill; and if there's going to be a general amnesty that goes beyond the Shipping Act, we certainly would prefer the use immunity to the blanket immunity that presently exists.

Senator INOUYE. The committee is well aware that this is a difficult problem but because of its difficulty we don't intend to just sit by. We are hoping that the Government will come forward and in addition to criticizing the measure give us some suggestions as to how we should cope with this problem. I think this Government has been aware of malpractices at least since the turn of the century, but frankly, very little has been done about this, and while this has been going on your Agency has ben doing a diligent job prosecuting but I think the record shows that foreign-flag carriers have been able to get away because you have these blocking laws, as they have been characterized by the Attorney General, which make it difficult if not impossible for your Department to get information from foreign shipping lines. We just received notice from the Japanese, that they would in no way permit their shipping companies to cooperate with you; and the Israeli's will not cooperate; and so it goes.

I'm not convinced that this is the right path to follow. Because if we continue to do so it will lead to only one conclusion as far as I'm concerned. Instead of U.S.-flags carrying 4.4 percent of your ocean-

borne commerce as we are today, we would be carrying less than 1 percent soon. I was concerned by the Yom Kippur oil embargo, but to me that embargo would be child's play compared to some shipping embargo that some powerful international group might try to impose upon us, which, believe me, is not far-fetched. It was just demonstrated to us 4 years ago that such an embargo can be put into operation.

I would like to indicate to you that in drafting this measure there was no intention on our part to cover all criminal activities as the testimony indicated. That would be totally naive on our part to say that every criminal case should be covered by this. But if a company should disclose that it was relating—let's say our bill becomes law—should that company be subject to a charge of conspiracy under section 371 of the Criminal Code that is should it be charged with conspiracy to commit an offense or to defraud the United States? Should that charge be covered under the immunity or the amnesty provision?

Mr. TAYLOR. Well, I don't know. I don't have enough facts. Our concern is that the way it presently is written a carrier that hasn't actual notice that it's under investigation but feels "I'm next, because there's a grand jury that's already looking into the activities of 'x' carrier and 'y' carrier and I'm going to be next," would run to the Commission and make disclosures. Thereafter, when its turn came and the investigation may reveal serious income tax violations, Currency and Foreign Exchange Reporting Act violations—we have even in some grand jury investigations currently going on had some indication there may be bribery and extortion involved coming out of some of this activity—it would get a pass. They would run in and make their disclosure and then they'd have a pass.

Senator INOUYE. Why don't you suggest an amendment that would eliminate this pass?

Mr. TAYLOR. Well, the use immunity at least wouldn't give them a pass. It would just say one can't use the disclosures or exploit them. It is definitely to be preferred.

Our concern is, as I indicated earlier, that this bill does appear to be retroactive. There are shippers under investigation in grand jury proceedings now which have made disclosures to the FMC, and it may be very difficult to show that those disclosures in no way were a factor in the grand jury investigation. Yet it is anticipated that they will be charged with income tax evasion and possibly Currency and Reporting Act violations.

So there's great concern about the retroactive aspect of this. Also I would say it is unnecessary to provide an amnesty that goes beyond th Shipping Act itself. It seems to me maybe we ought to confine it to violations of the Shipping Act. In fact, I find it rather odd that it doesn't forgive violations of the first and third paragraphs of section 16, but it would give immunity to violations of the income tax code.

Senator INOUYE. It wasn't intended to do that. Why don't you come forth with some suggestion? We are not the brains here, but you have made some suggestions. Can you provide us with your suggestions?

Mr. TAYLOR. I would just say, looking at the language as it exists, that no person be subject to criminal violations under the Shipping

Act. I would at least confine it to the Shipping Act instead of the laws of the United States.

Senator INOUYE. What about the conspiracy charge? Should that not also be covered? Would anybody come forward knowing that he had been cleared of the Shipping Act provision but not the conspiracy charge?

Mr. TAYLOR. Or that he might be subject to income tax violation. This conspiracy, I don't see the fascination with it.

Senator INOUYE. Let's skip the Securities and Exchange Act violations, and look at the conspiracy charge, which is a favorite section of the Justice Department.

Mr. TAYLOR. Yes; but it's usually conspiracy to do something. Conspiracy to violate the Shipping Act?

Senator INOUYE. No; conspiracy under section 371 which is a conspiracy to commit an offense or defraud the United States which is a catch-all. Should that immunity cover that type of activity because if it doesn't I don't see how any company is going to come voluntarily to disclose anything to you.

Mr. TAYLOR. You're suggesting that if the amnesty merely said they wouldn't be prosecuted under the Shipping Act they might find themselves charged under 371 with a conspiracy to violate the Shipping Act.

Senator INOUYE. Would you do that?

Mr. TAYLOR. I don't think that would be in keeping with the spirit of the act, I would think perhaps language to say under the Shipping Act or conspiracy to violate that act, perhaps language like that; and where it says within 1 year after date of enactment, I think we might say from the date of passage of this act and up until 1 year after date of enactment a person committed such acts and had made full disclosures—making it prospective rather than retrospective. Rather simple changes in the drafting I think would accomplish the prospective rather than the retroactive aspect.

Senator INOUYE. If you would provide us the simple changes I would really appreciate that, sir.

Mr. TAYLOR. Certainly. I will be happy to.

Senator INOUYE. Supposing a company, under your suggestion, under the Shipping Act of 1916 plus the conspiracy, has rebated and has deducted from his income taxes the rebates as a cost of doing business. Do you think by filing such a return with such a statement it should be prosecuted, or do you think it should fall within the provisions of the proposed use immunity that you have just discussed? The company has rebated and has deducted from his income taxes the rebates as a cost of doing business.

Mr. TAYLOR. Then there would be a question whether that was an appropriate deduction.

Senator INOUYE. Do you think filing such a return with a statement that these are rebates and we are deducting them as a cost of doing business, should that company be prosecuted?

Mr. TAYLOR. If he violated the income tax laws, he certainly should be prosecuted. He would be. You would be, and why the company shouldn't be is beyond me.

Senator INOUYE. Even if that company says, "We have rebated and we have listed those rebates as a cost of doing business"?

Mr. TAYLOR. Now I'm not with the Tax Division. I don't know their tax policies. It may well be that a company that came in and made such disclosures to the Internal Revenue Service, for example, would be treated as a civil tax violator and would pay a penalty or something of that sort.

Now when I say certainly they should be prosecuted, I would like to amend that because I'm quite aware, even though I'm not in the Tax Division and don't work with tax violations, that there's a line drawn between what would be a criminal prosecution and what might be a civil tax fraud or civil violation. Making disclosures of a voluntary nature to the Internal Revenue people, I assume, would make a great difference in which type of action were brought. So it may well be that they would not be criminally prosecuted. I suppose it would depend on the circumstances, but I would have to defer to somebody who is more familiar with tax prosecutions.

Of course, there may be another type of tax violation here. Shippers who receive rebates and don't declare them as income might be guilty of income tax violation.

Senator INOUYE. Well, they should be.

Mr. TAYLOR. Yes, and presumably would be subject to criminal prosecution.

Senator INOUYE. What if they declared that, that they had received rebates?

Mr. TAYLOR. And didn't declare them as income?

Senator INOUYE. No. They declared that as income and listed them as rebates.

Mr. TAYLOR. And declared it as income and paid taxes on it?

Senator INOUYE. Yes.

Mr. TAYLOR. I would assume they would not be guilty of an income tax violation, but I understand that some of these grand jury investigations have involved shippers who have received rebates and have not declared them as income and were likely to be facing tax prosecutions.

Senator INOUYE. If I may, I'd like to now turn to other questions. Before doing so, if I may, I'd like to submit to your office several technical-type questions for your consideration and response.

I would now, without objection, submit for the record an address made by the Honorable Griffin B. Bell, Attorney General of the United States, before the American Bar Association luncheon on August 8, 1977.[1] This statement, as you may be aware, refers to comity and is a speech related to the problems that the United States faces with reciprocal laws between nations, and in connection therewith I would like to also make part of the record at this time a statement from the Congressional Research Service, dated September 20, 1977, dealing with the question of blocking statutes excusing noncompliance with Federal laws requiring disclosure.

Referring back to the Attorney General's statement, I believe the Attorney General makes it rather clear that we do have a problem in this country. I think that appears in page 6 of this speech. He's indicated that while our Government has tried to exercise comity and certainly has done so in good faith, many nations find our position

[1] See p. 144.

unacceptable, and he says we face blocking statutes. Those are his words. And he points out among the nations that have adopted such blocking statutes are the United Kingdom, the Federal Republic of Germany, Canada, Australia, the Netherlands; and, of course, as we know from other previous hearings, there are many others. There will be unavoidable situations where two sets of interest do conflict with each country viewing its own laws as supreme.

Then the Attorney General states, "We are obligated to do all that we reasonably can to prosecute foreign private cartels which have the purpose and effect of causing significant economic harm in the United States in violation of the antitrust laws." Then he goes on and states, "There's also a fundamental U.S. interest at stake when private businesses, although foreign, get together to injure and perhaps destroy an American competitor." As I indicated earlier, I believe we have been aware of rebating since the early 1900's, and it wasn't until the past few years that this issue of rebating has become a matter of some concern to our Government. As you have indicated, rebating is not a major part of your section's concern, but it is now a matter of concern. I want to make it clear to the witnesses that the culpabilities in rebating lie not just with the carrier—the carrier is guilty for making a payment—the shipper is also guilty when he takes a payment or when he insists upon payment before he gives his cargo. I think the Department of State has been aware of the shipping laws and policies of this country. But to my knowledge it has never notified the Congress that these foreign laws, which the Attorney General refers to as blocking legislation were beginning to proliferate or multiply around the world. I think the State Department can take some of the blame here.

The FMC until recently, beginning with its previous chairman, did little although it has been totally aware of rebating. It's no secret to the FMC. The evidence of this, I think, is obvious, and the action taken by the FMC to date has been, according to their testimony, not too significant. In fact, one of the Commissioners whose term recently expired was the primary witness before the Celler committee in 1961. That was quite some time ago, and those hearings lasted for many months. They include tens of thousands of pages of testimony dealing with rebating, malpractices, and other illegal procedures. Yet this Commissioner was a member of the Commission for 5 years or longer, and no action was ever taken on rebating. That was his testimony. All this time we knew about rebating but had never done anything about it.

In 1972, the Commission came forward to the Congress and asked to reduce rebating from a misdemeanor to a civil penalty, and the Congress accepted its recommendation. If I recall, the Senate accepted this change without a hearing. So I think the FMC has some involvement in the problems we face here, and I would think that your Department, the Justice Department—and I say this more respectfully—has failed to meet the issue squarely; or where it has faced the issue, it has faced it in a way that is contrary to the best interests of the United States. I think it should be also made clear that the Congress has also been responsible. We have been aware of this. We have had hearings, but very litle has happened because each time we have hearings, witnesses would come forth and say it's a controversial problem;

it's difficult to resolve; and it ends at that point, and so malpractices go merrily along.

We've had the Alexander committee hearings and report; and the Celler hearings; and then Congress said that it's too controversial; it's too big for us; why doesn't the shipping industry itself set up self-policing organizations. Well, they have had these self-policing organizations and they just haven't worked out. There's something radically wrong—with the administration of the laws, not just the laws themselves.

The maritime policy I think is very clear. This is the law of the land. It is a mandate to all of us to maintain for national security and economic welfare a strong merchant fleet. I don't think we have really done our best to implement this policy even though, as you have indicated, it is the law of the land.

On July 25, 1977 I received a letter from Hon. Cyrus Vance, Secretary of State, and he notes, "The Department has no mandate in this area of rebating and rate cutting to American flag shipping." I always thought that the law of the land applied to all of us whether it's the Department of Justice or the Department of State. If the Department of State has no mandate, I don't know why the Congress went through with this declaration of policy in 1936 and the 1916 act. I think the same criticism applies to the Department of Justice.

In a speech, the former Assistant Attorney General for Antitrust matters, Mr. Rose, on October 13, stated he was well aware that the antitrust activities of his division would be prejudicial to the U.S. flag liners because it could not enforce the same laws against the American flag competition.

Our committee has reviewed the position of the Antitrust Division of the Department of Justice in matters before the FMC, and we have reached certain conclusions. I don't know if these conclusions are valid, but I'd like to share them with you.

First, where the participants seeking FMC approval of agreement are all U.S. citizens, the possibility is very great that the Department of Justice will either intervene or make its views known to the Commission. We do not know of a single case where the Department of Justice has once supported any such agreement. I'm talking about antitrust agreements, section 15.

Where the participants in this antitrust agreement are all foreign citizens, the Justice Department has never—and this is what the record shows—has never filed any views and where they are partially American and partially foreign, the Department of Justice has vacillated between commenting and not commenting. Since 1970 there have been 44 significant consortia or merger agreements filed with the Federal Maritime Commission that involved only foreign flag lines. The Department of Justice has never once opposed the FMC approval of any of these agreements. Never once did the Department of Justice intervene where the FMC was considering the creation of the largest international cartels of transportation in the world.

But as the record will show, the Department of Justice will and has intervened when American flag carriers are involved in forming this type of consortia.

I would like any one of you here to explain to this committee why you have reached such a conclusion that where Americans are involved

you intervene, but when foreigners are involved exclusively, hands off. I think a simple answer is to say that you're bound by the Clayton and Sherman Acts. That is not going to be acceptable as far as I'm concerned. I realize those acts are the law and you can't violate them, but why Americans and not foreigners? Could you tell me?

Mr. FLEXNER. Mr. Chairman, I'm in charge of the Antitrust Division's program as far as the ocean shipping industry is concerned and let me say first that I can't agree with your first characterization as far as the Department's policy with respect to interventions before the FMC. It really is not based on whether parties to proposed agreements under section 15 of the Shipping Act are U.S.-flag carriers or are U.S. plus foreign-flag carriers or strictly foreign flag carriers.

For the period of time that I have been in charge of that particular program our interventions have been based solely on our perceptions as to whether or not particular agreements would likely have competitive consequences which should be fully understood by the FMC and which should be fully subject to a public airing in hearings, and I think the record would show that quite a few agreements concerning which we have sought hearings on the record have involved both U.S. and foreign flag carriers.

As to your second point, Mr. Chairman, I think that it is—I would have to review the record, but I think it's accurate to say that we have not opposed under section 15 of the Shipping Act FMC approval of foreign flag consortia or merger proposals as they have been submitted to the Commission and for that I don't have a very good answer.

It's certainly not—though it is true to say it is not an answer, that omission predated my involvement in the process, although that's a fact. I don't know what the consequences would have been had there been such interventions and had those matters been brought before the Commission.

I think it's an accurate statement that we did not intervene on those agreements.

Senator INOUYE. I wasn't quite clear. You said that you did intervene in American and foreign. That's a mix you're talking about.

Mr. FLEXNER. Yes; let me be more specific if I may.

Senator INOUYE. Have you ever intervened or opposed any agreement involving just foreign interests?

Mr. FLEXNER. Mr. Chairman, I don't know.

Senator INOUYE. Our records indicate absolutely zero.

Mr. FLEXNER. I think probably not, but then I don't know that that's terribly significant because I think most of the agreements—leaving aside consortia and merger proposals—I think that most of the agreements that hvae competitive consequences which are the kinds of agreements which we would be interested in that have been put to the Commission in my memory would have involved both U.S.-and foreign-flag carriers. There may be some that are discrete in respect to United States and discrete with respect to foreign, but I'm not aware of them. You may be correct, but I——

Senator INOUYE. So the Justice Department decided that none of the all-foreign type agreements had any competitive consequences?

Mr. FLEXNER. I don't know that that's what we decided because I don't know that we ever focused on the kinds of agreements that you're referring to.

Senator INOUYE. I can tell you that a lot of the people who were formerly executives of shipping companies which are now bankrupt would disagree with you because they were put out of business by some of these agreements.

Mr. FLEXNER. Well, I would be very interested in knowing what shipping companies claim that they have been put out of business by agreements to which foreign flag carriers were parties, a, and, b, I would be glad to go back and review the record as to what agreements, if any, involving foreign-flag carriers we have missed that might have had competitive consequences; but since November of 1976, which is the time I assumed responsibility for this program in the Antitrust Division, our sole criteria for involvement before the FMC has been being sought, was whether or not those agreements had significant competitive consequences, and, if so, what action, if any, we should propose the Commission should take. It's not been governed by the flag of the proponents of the agreement.

Senator INOUYE. Are you convinced that you have been evenhanded with foreigners and Americans?

Mr. FLEXNER. In my own mind, sir, I am confident that we have been evenhanded.

Senator INOUYE. Then what Assistant Attorney General Rose said was not right, that he knew it was prejudicial against American interests?

Mr. FLEXNER. No. First of all, he was the Deputy Assistant Attorney General.

Senator INOUYE. Well, whoever he was.

Mr. FLEXNER. I would have to go back and read that. I don't think that he meant to say that we would only enforce U.S. law against U.S. flag interests. In fact, Mr. Chairman, we have a grand jury investigation—in fact, we have an investigation pending now which involves both U.S. and foreign flag carriers. We would not willingly submit to a policy that had the U.S. law only being applied to U.S. interests.

Senator INOUYE. Have you been able to subpena foreign interests? presently pending against some shipping activity?

Mr. FLEXNER. We have two grand juries, Mr. Chairman.

Senator INOUYE. Have you been able to subpoena foreign interests?

Mr. FLEXNER. We have where their documents have been located in the United States. We have not where their documents have been located in foreign countries which have invoked laws forbidding those companies to comply with our subpoenas.

Senator INOUYE. And the documents in the United States have been meager at best, have they not?

Mr. FLEXNER. No, sir, that's not the case. In fact, the document production that we have obtained has been very substantial and I think at this point we will have more than enough to make a determination as to whether or not a violation of law has occurred.

Senator INOUYE. Do you think that something should be done to extend the application of our laws to foreign shippers also on an equal basis?

Mr. FLEXNER. I think, sir, that the law should be applied on an equal basis. The question of rebating is a very difficult one in this sense. I'm not sure that the committee is coming to a solution from the

right angle. What I mean by that is the incentive for rebating will in no way be alter by increasing the sanctions that attach to actual rebating. Those incentives exist by reason of the fact that notwithstanding the Shipping Act which authorizes conferences to exist, ocean carriers are basically competitive beasts. They will seek to take customers away from one another and they will seek when confronted with price cutting or superior forms of services to retain customers by one means or another.

In addition, conferences, by reason of the fact that they fix rates for the services they offer, will generate excess capacity. All of these forces combine to create—and I think this may have even appeared in your opening remarks in the March hearings—all of these will combine to create an incentive to cut prices, which is essentially what we are talking about. We are talking about offering to a shipper a rate that is lower than that in his published tariff. In other contexts, that's called price competition. I think that the committee ought to consider an alternative that would serve as kind of a pressure valve where the incentives would build up to a point where you would normally see a rebating situation instead of trying to meet that problem with increased sanctions under the law. You might consider whether or not providing for right of independent action, which I think on brief reading of the Sea-Land testimony is what they are proposing, might not provide sufficient flexibility so that without viodating the law a member of a conference could meet the competition of his foreign flag competitor. And one of the problems that's most difficult for this committee to face is if law enforcement is, by definition, going to be more difficult in respect to foreign flag carriers than it is with respect to U.S.-flag carriers, then the best that an effective law enforcement policy can do is to fall heavier on U.S. violators. This, in turn, will disadvantage them to a greater extent.

Senator INOUYE. That's the situation now.

Mr. FLEXNER. That's the situation now. It will disadvantage them to a greater extent if that is true than it will a foreign flag carrier. So that I would strongly urge, Mr. Chairman, that you give some careful consideration to whether or not there is an alternative which would put U.S. flag carriers on a more equal footing vis-a-vis their foreign competitors than increasing the sanctions for a U.S. law which may be very difficult to apply to foreign carriers.

Senator INOUYE. Do we have any laws on our books which would prohibit American carriers from responding to a subpoena duces tecum issued by another country?

Mr. FLEXNER. I don't believe we do, and I'm sure that the State Department, Mr. Bank, would confirm that. I'm sure we do not.

Senator INOUYE. Are you concerned that other countries have such laws?

Mr. FLEXNER. Very much.

Senator INOUYE. So your conclusion is that under the present set of laws as they are administered, and because you feel you have no choice but to administer these laws, that there's no equal justice as far as American flag carriers are concerned?

Mr. FLEXNER. I feel, Mr. Chairman, that try as we might, there will always be difficulty in enforcing the law in a fair and nondiscrimin-

atory way on both U.S. and foreign flag carriers. I think there's no question that that's so.

Senator INOUYE. Before going any further, I'd like to make it very clear that I do not condone rebating, and I do not intend to condone rebating and malpractices or any illegal procedure. But you have just pointed out that the way the present law is applied, we can't help it. We are at a disadvantage. Mandating the right of independent action as a condition of approving conference agreements incidentally has been objected to by just about every other U.S. carrier because Sea-Land is so big that competition would not be just against foreign competitors but against Americans.

Mr. FLEXNER. Yes. Mr. Chairman, I might point out to the committee—I'm sure you already know this but it might be worth exploring—to determine the viability of their proposal to take a look at experience under the Interstate Commerce Act which as you know it authorizes rate bureaus which are not very dissimilar from shipping conferences and under which law a right of independent action is guaranteed to members of rate bureaus, both railroads and motor carriers.

Senator INOUYE. Is your position the same as those suggested earlier by Mr. Taylor on use immunity?

Mr. FLEXNER. My position is the same, and I might add, Mr. Chairman, that the bill as presently drafted would seriously undermine or could possibly seriously undermine or make more difficult pending grand jury investigations involving violations of the antitrust laws, which as you know are now felonies, and I would strongly urge the committee to find a way to greatly narrow the scope of the amnesty provisions in light of remarks you have heard this morning.

Senator INOUYE. Can you get together with Mr. Taylor and come up with language that would make it prospective as you suggest?

Mr. FLEXNER. Certainly.

Senator INOUYE. What are your thoughts on the conspiracy laws?

Mr. FLEXNER. Well, I'm a conspiracy lawyer.

Senator INOUYE. Should the use immunity apply to that also?

Mr. FLEXNER. The problem is that you may have a situation where a rebate is given as part of a larger conspiracy, say, for example, a conspiracy to violate the antitrust laws. The rebate may have as its purpose the elimination of independent U.S.- or foreign-flag nonconference competitors for the purpose of securing a monopoly position to a conference or a group of carriers. As such, I think it's a difficult choice to make. Whether you want to provide immunity from the larger crime. If what you're talking about is simply immunity of some limited kind, use immunity under the Shipping Act, it should be clear that that would not immunize the disclosing person from prosecution under the antitrust laws.

Senator INOUYE. Now, are you convinced that rebating malpractices in the shipping industry is a matter of serious concern?

Mr. FLEXNER. I think it is a matter of serious concern because it's a violation of law, (a), and, (b), it clearly occurs often.

Senator INOUYE. Are you convinced that it is widespread?

Mr. FLEXNER. I don't know how widespread it is.

Senator INOUYE. You don't believe it's isolated?

Mr. FLEXNER. I believe it occurs and members of the industry and shippers allege that it occurs frequently, but I don't know.

Senator INOUYE. Well, since the 1960's, we have been having hearings after hearings, and all of them seem to indicate that it's widespread. Everybody is involved. Are you convinced that the laws—I'm asking this again just for the record—are you convinced that the laws on our books are sufficient to cope with this problem?

Mr. FLEXNER. I don't think the law can be sufficient to cope with the problem.

Senator INOUYE. And in the strict application of the law, can the American carrier expect to get equal treatment with foreign competitors?

Mr. FLEXNER. I don't think so.

Senator INOUYE. I thank you very, very much and I would appreciate it if all of you could get together and come up with something, because I can assure you that as chairman of this subcommittee I don't intend to hold hours of hearings and just file a report and say that we have got a horrible situation; the maritime industry is going down the drain, but we're sorry, we'll just have to say goodbye to them. I intend to do something about this. I think the time for hearings has come to an end. I think the time for action is here and I can assure you that every step will be taken to assure action and, your Department will be playing a major role in this, at least I hope so. So any suggestions, recommendations, and assistance you can provide would be most gratefully received, I assure you.

When this measure was introduced, it never occurred to me that it could be the final answer. Even the bill that passes and becomes the law of the land is not going to be the final answer, but I hope something can be done to bring about evenhanded treatment and make our trades a bit more competitive for American carriers. At the present time, because of these blocking statutes that are referred to by the Attorney General, our carriers are just not getting a fair shake in this business. So anything you can do would be most appreciated, and as I said earlier, I'd like to submit to all of you several questions that were prepared for your consideration.[2] Thank you very much.

Mr. LEDEBUR. Thank you, Mr. Chairman.

[The following information was subsequently received for the record:]

DEPARTMENT OF JUSTICE,
Washington, D.C., December 12, 1977.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce, Science and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on S. 2008, the "Shipping Act Amendments of 1977."

S. 2008 would amend the Shipping Act of 1916, 46 U.S.C. § 801 *et seq.*, in two important respects. Section 2 of the bill amends § 22 of the Shipping Act, 46 U.S.C. § 821, to add a new subsection (c) which would require the Federal Maritime Commission to respond to complaints alleging rebate violations of Section 16 of the Shipping Act, 46, U.S.C. § 815 (other than paragraphs First and Third), or Section 18(b), 46 U.S.C. § 817(b), within 30 days after receipt of such complaints, by ordering an investigation and hearing or denying the complaint with written explanation. Within 180 days after an order of investigation and hearing, the Commission would be required to issue a final order, or an interim order stating in full why it could not issue a final order.

[2] See pp. 136 and 139.

New subsection (c) further provides that the failure of any respondent in such a Commission investigation to comply with discovery would have the following effects: (1) tolling the time within which the Commission must inssue a final order; (2) immediate suspension, without hearing, of all tariffs filed by the respondent, as well as denial of entry to the vessels operated by the respondent into any United States port until compliance is achieved; and (3) creation of a rebuttable presumption that the facts alleged in the complaint or in the Commission's Order are established for purposes of the proceeding.

Section 3 of the bill would amend Section 32 of the Shipping Act, 46 U.S.C. § 831, by inserting a new subsection (d)(1). The new subsection provides that no penalty will be imposed on any person for violation of Section 16 (other than paragraphs First and Third) or Section 18(b) if the violation occurred before the date of enactment of the subsection, and within one year after the date of enactment the violation is disclosed to the Commission. No criminal prosecution for violation of any U.S. law would be undertaken for any violation if the disclosure occurs before the person has actual notice that he is the subject of an investigation by any government agency.

In essence, the proposed amendments to the Shipping Act of 1917 [ic] present a "carrot and stick" approach in an attempt to eliminate rebating in the foreign maritime trade. The "carrot" aspect of the bill is a general amnesty provision which will allow a carrier who prior to the enactment of this legislation engaged in rebating practices and who discloses information concerning such rebating to the Federal Maritime Commission to escape criminal sanctions. The Department does not favor criminal immunity in these cases. However, if an immunity or amnesty provision is to be enacted, we strongly object to the language of this bill, which is so general as to grant immunity from any criminal prosecution. A blanket amnesty, in the Department's judgment, is unnecessary to accomplish the aim of this legislation. We would therefore favor and urge a more limited form of immunity, i.e., one confined to the criminal prosection of Shipping Act violations.

Accordingly, we would suggest that proposed new subsection (d)(1) of Section 32 of the Shipping Act be amended to read as follows:

"(d)(1) Subject to the provisions of paragraph (2), no penalty shall be imposed under section 16 for any act in foreign commerce which constitutes a rebate or refund by any unjust or unfair device or means in violation of the initial paragraph or paragraph Second or section 16, or under section 18(b) for any act which constitutes a rebate or refund in violation of subsection 18(b)(3), or for conspiracy under Title 18, United States Code, Section 371, to rebate or refund in violation of the aforesaid provisions of this Act if—

"(A) such act occurred before the date of enactment of this subsection; and

"(B) during the period beginning on the date of enactment and ending one year thereafter, the person who committed such act has made a good faith disclosure to the Commission without knowledge that it was the subject of an investigation relating to such act by any agency of the Federal Government."

We note that the Federal Maritime Commission has expressed the view that any immunity or amnesty should be limited to rebating violations of the Shipping Act.* Should the Maritime Commission propose language sufficient to so limit the amnesty, we would defer to its position as the agency charged with administering the Shipping Act.

As for the "stick," or deterrent provision of the amendment, the Department is not generally opposed to measures which are aimed at the more effective enforcement of existing law. We do, however, foresee several problems in attempting to improve enforcement by port interdiction and tariff suspension. A respondent carrier's entry to U.S. ports would be foreclosed and tariffs suspended for failure to cooperate with FMC investigations. Furthermore, these sanctions could be imposed without a hearing on the reasons for a respondent's failure to comply. It would seem that such a procedure, or lack thereof, is vulnerable to challenge for lack of due process. In addition, this legislation may conflict with treaty obligations and requirements imposed upon carriers by foreign governments.

* See "Statement of the Honorable Richard J. Daschbach, Chairman, Federal Maritime Commission before the Merchant Marine Subcommittee, Science and Transportation," September 28, 1977, page 13.

For example, a carrier may be unable to produce documents located in another country because of that nation's restrictive statutes. Such a situation would not only create a dilemma for the carrier, but also may strain diplomatic relations with those countries and if the rebating practices of foreign flag carriers could not be effectively prevented, U.S. carriers would likely suffer from the competitive disadvantage.

Given these problems, it might be fruitful to explore less drastic methods for obtaining improved compliance with the law. In this regard it should be noted that the practice of rebating is a consequence of the price uniformity imposed by the conference system. At present ocean carriers are allowed, pursuant to FMC authority, to combine in conferences and agree on uniform rates for an entire trade. Conference members are required by law to adhere to the conference tariff. Rebating is a secret departure from the conference tariff in response to competitive influences. The existence of rebating strongly suggests that conference rates exceed competitive levels. The Department believes that a right of independent action requirement for conference members would relieve some of th pressures that lead to rebating and would thus improve compliance with the law. Such a requirement would allow carriers to respond openly and speedily to competitive pressures rather than resorting to *sub rosa* measures.

Finally, the Department notes that the provisions of this bill apply to Section 18(b) of the Shipping Act in addition to portions of Section 16. Section 18(b) deals with tariffs generally, notice requirements for rate changes, rebates or refunds, and unreasonably high or low rates. Only Section 18(b)(3) specifically concerns rebating. We would, therefore, suggest that this amendment be narrowed so as to include only that conduct intended by the drafters.

The Department of Justice opposes enactment of this legislation as presently drafted.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

PATRICIA M. WARD,
Assistant Attorney General.

Senator INOUYE. Our next witness is the Director of the Office of Maritime Affairs, Bureau of Economic and Business Affairs, of the Department of State, Richard K. Bank.

Welcome to the committee, sir, and before proceeding, will you introduce your colleagues?

STATEMENT OF RICHARD K. BANK, DIRECTOR, OFFICE OF MARITIME AFFAIRS, BUREAU OF ECONOMIC AND BUSINESS AFFAIRS, DEPARTMENT OF STATE; ACCOMPANIED BY JOHN R. COOK, OFFICE OF LEGAL ADVISER; AND JOHN A. PURNELL, OFFICE OF MARITIME AFFAIRS

Mr. BANK. Yes; I will. Thank you and good morning, Mr. Chairman.

My name is Richard K. Bank. I am Director of the Office of Maritime Affairs in the Department of State. Accompanying me on my right is Mr. John R. Crook of the Office of the Legal Adviser, Department of State; and on my left is Mr. John A. Purnell of the Office of Maritime Affairs.

I thank you for this opportunity to permit the Department of State to testify on S. 2008, a bill "to amend the Shipping Act, 1916, to reach a permanent solution of the rebating practices in the U.S. foreign trade."

Specifically, I am pleased that the Department of State was invited to testify, in view of the important role which the Department plays in protecting U.S. shipping abroad. We offer our views on this proposed legislation with the aim of contributing to a solution of one of the serious problems which face U.S. liner operators in the foreign trade of the United States.

We therefore appreciate and share the concern about illegal rebating practices in the U.S. foreign trade—and in particular the harmful effects which these practices have on U.S. operators—which prompted the introduction of this legislation. Let me start off by saying that the Department of State could support the proposed addition of a new section (c)(1) to section 22 of the Shipping Act to provide expedited procedures for rebating proceedings, as provided in section 2(c) of S. 2008.

However, the Department does not consider advisable the creation and imposition of drastic new sanctions in the case of those persons prevented from complying with Federal Maritime Commision investigative orders because of foreign laws prohibiting compliance. Instead, we believe that the concerned agencies, including the Department of State and the FMC, should attempt to work with the Congress to devise alternative procedures to facilitate foreign compliance with the Commission's requirements for information.

A major difficulty in documenting illegal rebating is that the documentation required is often located in foreign countries, and that many such countries, including such close allies as the United Kingdom, the Federal Republic of Germany, Japan, and France have laws or regulations in force that forbid or restrict the release by companies of shipping documents to a foreign government. Several of these laws were enacted in direct response to previous attempts by U.S. regulatory agencies to investigate foreign companies and shipping conferences, attempts which many governments considered an unwarranted effort to extend U.S. jurisdiction beyond U.S. territory in violation of their rights as sovereign states. S. 2008 would impose stringent sanctions on shipping lines that refused to supply requested documents to the FMC or otherwise to cooperate with the Commission, even though the refusal or failure to cooperate resulted directly from the requirements of these foreign laws against disclosure.

We are not confident that the threat of such sanctions, or their application, will persuade foreign governments to waive the application of their laws against disclosure. Instead, we believe that the threat and imposition of such sanctions could contribute to acrimony and inflexibility which will reduce the prospects for foreign cooperation with the Commission and which may impair our overall relations with the countries concerned?

Senator INOUYE. Could I ask questions as we go along?

Mr. BANK. Certainly.

Senator INOUYE. First of all, do you agree that the attempts by U.S. regulatory agencies to investigate foreign carriers are an unwarranted effort to extend U.S. jurisdiction beyond the U.S. territory in violation of rights of sovereign states?

Mr. BANK. No; we don't think that at all. This is the law of the land and for those who operate in U.S. trade they must operate under U.S. law. This has always been the Department policy.

Senator INOUYE. What have you done to implement this?

Mr. BANK. We have sought—well, I'll put it this way, Mr. Chairman. In situations where we are requested by the FMC or the Justice Department or others to discuss with foreign governments these questions and on our own initiative where situations of this type are before us, we have dealt with the foreign governments in an attempt to obtain compliance with U.S. law. We are not an investigatory agency. We are not a prosecutory agency. We are a foreign relations agency. In pursuance of investigations of malpractices and rebating and other illegal activities, we, and the Congress, look to the Federal Maritime Commission and the Justice Department to initiate these investigations.

Senator INOUYE. But you have had discussions you said with foreign countries?

Mr. BANK. Yes.

Senator INOUYE. Have you been successful?

Mr. BANK. I think to a large degree in some areas we are gaining in convincing them that in order to operate in our trade they must operate under our laws.

Senator INOUYE. Can you name one country where you are gaining? I'm just curious.

Mr. BANK. There's an investigation which is referred to—well, there are a number of investigations going on in this area and in others.

Senator INOUYE. Are you gaining in Japan?

Mr. BANK. On particular rebating situations?

Senator INOUYE. No; for them to cooperate with our laws.

Mr. BANK. In our statement, Mr. Chairman, we do make reference to a diplomatic representation. I think that diplomatic representation sets forth an understanding by certain foreign governments of the recognition of the role of the U.S. agencies in outlawing or eliminating illegal rebating and their desire to cooperate with us in perhaps creating new regimes and new cooperative ventures on a government-to-government basis to permit rooting out of rebating. I think specific instances of specific governments having been approached are not as—well, let me put it this way, Mr. Chairman. We have had few, if any, requests by the investigatory agencies that involved a particular country's laws to enable their citizens to provide the information.

Senator INOUYE. But you have been aware of rebating for a long time, haven't you?

Mr. BANK. Yes; we have.

Senator INOUYE. And you have been aware that many countries have passed legislation referred to as blocking statutes by the Attorney General?

Mr. BANK. Yes; I made reference to it.

Senator INOUYE. And I'm certain you would conclude that these laws have one specific purpose, and that is to frustrate our investigation?

Mr. BANK. That's correct.

Senator INOUYE. And you have not been successful in having these statutes repealed? In fact, they are proliferating now?

Mr. BANK. Well, I don't know whether they are proliferating.

Senator INOUYE. We just got a statement from Israel saying "Lay off." We got a statement from Japan saying, "You lay off."

Mr. BANK. Those statements, I believe, involved certain FMC investigations regarding their view of certain subpenas, but the laws themselves, as I pointed out, were passed by these countries in specific reference to FMC investigations in the early 1960's. But in regard to the question that you asked regarding specific instances where individual countries have decided or have contemplated not using those laws or not enforcing those laws vis-a-vis their own operators, through the discussions we have had with foreign governments, I believe things are changing and in fact we have had indications from foreign governments, as we point out in the latter part of our statement, that they are willing to cooperate and are willing to sit down and discuss international regimes—bilateral or multilateral—which would overcome this problem.

Senator INOUYE. I have a very small staff, as you are aware. The staff is sitting here. And the studies we have made so far as to the application of antirebating laws by foreign countries clearly indicate to this committee that in the past 5 years no foreign flag shipper has ever been prosecuted and convicted. Is this an improvement? They have laws but somehow the law has never been applied. Do you know of any instance where Great Britain has applied its antirebating laws against British shippers?

Mr. BANK. On the antirebating laws, Mr. Chairman?

Senator INOUYE. Yes; or West Germans or the Japanese?

Mr. BANK. Mr. Chairman, I don't believe they have antirebating laws in the same regulatory fashion that we have. If you're referring to these laws which we made reference to with regard to prevention of disclosure of documents of foreign governments——

Senator INOUYE. No; you indicated that some of these countries have antirebating laws which have not been enforced.

Mr. BANK. No; I didn't make reference to that. I'm sorry if I did. What I had meant to say is that they have laws which prevent the disclosure of information to an arm of a foreign government, for example, our Federal Maritime Commission, and these laws have been put into effect. And in fact, with regard to the reference made by Mr. Flexner of the Justice Department a few moments ago concerning an antitrust investigation that's going on, we have had discussions with foreign governments concerning those same laws, and those laws have in fact been put into effect preventing to some degree the disclosure of certain documents which the Justice Department has sought.

Senator INOUYE. Have you seen any change in their position?

Mr. BANK. I see a change in their position, Mr. Chairman; I do.

Senator INOUYE. Now you have indicated here—and this is from page 3—

> Indeed, we have indications that some countries would bar all U.S. ships from their ports in retaliation for the banning of vessels of a line of their nationality from U.S. ports.

As you know, the record should show that we carry less than 5 percent—I think it's 4.4 percent of the total tonnage of our foreign trades, and the rest of the world has over 95 percent. Do you think they are going to retaliate against us with our few ships? Because every major country that's involved in ocean shipping has to depend upon American trade to make a living.

Mr. BANK. No. I agree with that, Mr. Chairman, but I think in regard to the major trades that are involved in the 4½ figure, which is an overall tonnage figure, it is not accurate. In fact, our carriage in certain containerized trades in the North Atlantic, U.S. flag carriage, is close to 50 percent of those trades. Some problems are involved with certain of these same countries whose shipping lines are the subject of investigation. These are the same countries involved in the North Atlantic trades or the Pacific trades where U.S. carriers carry a significant part—if not close to half—of the trade involved and not a 4-percent figure.

I have been informed through informal conversations of the possibility of not only reaction by foreign governments to any closing of our ports to their flag carriers, but also to the strong possibility, if not a probability, of labor unions in these other countries causing, upon the closure of our ports to their flag carriers, the closure of their ports to ours.

This creates another major problem and an additional danger as I have pointed out in my prepared testimony, Mr. Chairman. With our lines being banned from foreign ports and their lines being banned from our ports, the question really comes up as to whether the trade is going to continue at all and we feel it would continue but that this trade would be carried by third flag operators. Therefore the ultimate result of these sanctions would be to provide a new and large foothold in the U.S. trades for the third flag carriers.

We see a problem with the sanctions aspect in that manner.

Senator INOUYE. Now how long has the State Department been aware of this problem?

Mr. BANK. The rebating problem, Mr. Chairman?

Senator INOUYE. Yes.

Mr. BANK. I guess we have been aware of it as long as most other interested parties in the maritime industry have.

Senator INOUYE. And how long have you been aware of these countries that have been passing laws prohibiting their liners to respond to subpenas?

Mr. BANK. Well, these laws, as I mentioned earlier, Mr. Chairman, began in the sixties in direct reaction to the Federal Maritime Commission creation and some of its investigations, and we have been aware of it, and the Congress has been aware of these laws. We have discussed it with members of staff. Our records go back to the late sixties on that. Other agencies in the U.S. Government—the FMC, the Maritime Administration—knew as well, since this is a quite well known phenomenon in international shipping.

Senator INOUYE. So you have known about these laws for about 15 years?

Mr. BANK. I would say so, as to some of them.

Senator INOUYE. And in the 15 years the State Department I would presume has made diplomatic overtures—I don't know what you do—file objections—but what has been the scorecard?

Mr. BANK. Mr. Chairman, there are very few instances when the State Department or any U.S. agency in fact comes in conflict with these laws, but only in those situations where an investigatory agency such as the FMC or the Justice Department seeks to obtain certain

pieces of information which are not handed over by virtue of these laws. It's the threat of these laws which has often caused investigatory agencies to refrain from seeking such information. I can't think of more than two or three cases where these laws have been invoked in fact, and at those times we have made representation. Those have been the most recent ones, and, as I said before, Mr. Chairman, I think right now there is the realization by certain foreign governments and their shipping lines that we live in a world in which sovereignty applies on both sides of the ocean. You put it quite well, Mr. Chairman, that U.S. trade is an important trade to foreign-flag operators, and that in order to operate in our trade they must operate under our laws.

I think this greater understanding in this regard has brought a warming or at least a pronounced desire on the part of foreign governments to discuss with us a regime in which the laws of both sides certainly should be able to apply.

Senator INOUYE. I don't suppose you had anything to do with this, but recently the Japanese Government had a well publicized investigation involving some of their very top government officials, the so-called Lockheed case, and our State Department was most generous, most courteous, and we fully cooperated. We assisted the Japanese Government by providing them with documents and results of secret investigations, et cetera, and here's that government refusing to comply with our laws—a simple subpena duces tecum. Why can't we do the same thing with them? If the Japanese ask us for information, why can't we say we have sovereignty also?

Mr. BANK. Well, we in fact have discussed this within the Department and in the FMC in an informal sense on a working level, and we in fact are working closely with the FMC in this investigation and in an attempt, hopefully a successful one, to resolve the problem.

Senator INOUYE. Please proceed.

Mr. BANK. We believe from our experience in related contexts, particularly in the antitrust area, that many foreign governments' opposition to permitting the release of information results from pique at having their shipping lines and other companies presented with unilateral U.S. investigative demands for documents physically located outside the United States. We believe that prior intergovernmental consultation regarding the scope and purpose of an investigation, and making clear its importance to the United States, can help to eliminate these problems and to secure a larger measure of cooperation from the foreign governments concerned.

Senator INOUYE. May I interrupt there? Have you had any cooperation as a result of prior intergovernmental consultation?

Mr. BANK. I think we are achieving that cooperation now, Mr. Chairman.

Senator INOUYE. In one country?

Mr. BANK. No. A number of countries.

Senator INOUYE. Which countries?

Mr. BANK. As I point out, there was a diplomatic representation by the governments of Denmark, Finland, Federal Republic of Germany, Italy, Japan, the Netherlands, Norway, Sweden, and the United Kingdom——

Senator INOUYE. Have they cooperated? It's easy to come out with diplomatic language saying we'll do our best, but have they done their best?

Mr. BANK. We are beginning and we will be sitting down with them trying to obtain a regime in which this information, or sufficient information for the investigations, can be obtained.

Senator INOUYE. I believe there's a case involving a shipping line named Zim, an Israeli line. I think the Justice Department is interested, and Zim just issued a statement, I believe, with the concurrence of the Government, saying that, "We will not cooperate." Did you have any prior intergovernmental consultation with Israel on this matter?

Mr. BANK. No; we have not, nor have we been requested to participate in that proceeding between either Justice or the FMC and Zim or the Israeli Government.

Mr. Chairman, as I pointed out before, as a foreign relations agency and not as an investigatory agency, we cannot initiate and we do not initiate rebating or other type investigations or participate on our own motion, so to speak.

Senator INOUYE. Then may I ask, has the FMC or the Justice Department ever asked your agency to participate by prior intergovernmental consultation in any case? One case would be fine, sir.

Mr. BANK. Mr. Chairman, the antitrust matter which I discussed earlier is one in which we participated in cooperation with the Justice Department. As to rebating investigations by the FMC, other than administrative assistance, we have not been asked to assist.

Senator INOUYE. I have here a response to a paper that I personally presented to Secretary Vance in which it says that the FMC has never requested the Department's help; neither has SEC.

Mr. BANK. That's correct. Neither agency has requested it.

Senator INOUYE. So if nobody asks, you don't move?

Mr. BANK. Well, in this specific regard on the question of the laws of the sovereign state, and especially in situations where investigations are being handled by the proper U.S. agency involved, our role is to assist in the foreign relations aspect upon request. We don't, as I said, initiate this type of activity. I would feel that it would be less our role to do that than, for example, other agencies handling foreign relations.

Senator INOUYE. Please proceed, sir.

Mr. BANK. As I noted, we believe that prior intergovernmental consultation regarding the scope and purpose of an investigation, and making clear its importance to the United States, can help to eliminate these problems and to secure a larger measure of cooperation from the foreign governments concerned. In short, since the control of rebating is a problem which involves foreign laws, we believe that the only way to obtain the necessary documents is to negotiate a regime of cooperation with other major shipping nations. We are not advocating ignoring rebating or giving in to foreign laws prohibiting production of documents, but we believe that negotiation is the only practical way to obtain the necessary information and avoid fruitless and damaging conflicts of laws.

Senator INOUYE. May I interrupt at that point? I ask this very seriously. I presume you have begun your negotiations and discussions in this endeavor.

Mr. BANK. Well, the first step has been taken.

Senator INOUYE. Now, how long do you think it will take before we can anticipate full cooperation from these shipping countries?

Mr. BANK. I can't say, Senator. As I point out again later in the testimony, the interest of this committee and, of course, the Congress as a whole, I think, will hasten a solution. I think it will move toward a solution much quicker than it would otherwise. I think it's important. I think it's something we have to work on, and I think it's something all parties, both United States and foreign, have to be aware is a serious one which the FMC has announced its dedication to eradicate, and we will work as closely as we can with this committee and with the FMC in trying to come to an agreement with our foreign counterparts in obtaining a solution.

Senator INOUYE. Please proceed.

Mr. BANK. We believe that the prospects for achieving such cooperation are promising. In a note delivered to the Department of State on September 27, 1977, the Governments of 10 major maritime nations (Belgium, Denmark, Finland, the Federal Republic of Germany, Italy, Japan, the Netherlands, Norway, Sweden, and the United Kingdom) emphasized that they also disapprove of the malpractices to which S. 2008 is addressed. At the conclusion of their note, these Governments pledged that they:

> Would be willing, in any investigation of such matters which involved their carriers and where relevent material and information was located in their jurisdiction, to enter into discussion with the U.S. authorities, with a view to finding a solution which would put an end to unfair and discriminatory trading practices in a manner compatible with the law and practices of both sides.

Senator INOUYE. May I ask a question there? And I will have to excuse myself shortly because there's a vote.

What led these countries to suddenly issue a note dated September 22, 1977?

Mr. BANK. I think it's a combination of two things primarily, Mr. Chairman. One, of course, was your introduction of this piece of legislation. In fact, the note—a copy of which we will happily send to the committee——

Senator INOUYE. Without objection, it will be made part of the record at this point.

[The following information was subsequently received for the record:]

> The Governments of Denmark, Finland, The Federal Republic of Germany, Italy, Japan, The Netherlands, Norway, Sweden and the United Kingdom have noted Bill number S. 2008, introduced in the Senate of the United States on August 4, 1977, and intended to secure a permanent solution to rebating practices in the U.S. foreign maritime trade.
>
> The above mentioned Governments wish to emphasize at the outset that they too disapprove of the trading practices to which the Bill is addressed. The remedi too disapprove of the trading practices to which the Bill is addressed. The remedies provided in their own law and commercial practice differ, however, from those applied in the United States.

While sympathetic, therefore, to the Bill's overall objective of dealing with rebating practices, the Governments are concerned over some of its provisions—in particular, the passage that would require the Federal Maritime Commission to suspend the filed tariffs and deny entry to United States ports of the vessels of any carrier which for any reason failed to comply with dispositions, written interrogatories, discovery procedure or subpoena issued in relation to an investigation by the Commission into the matters which are the subject of the Bill. Should any of the above mentioned Governments elect to exercise their right in international law to prohibit their own carriers from providing material or information located within their own jurisdiction, they would regard the suspension of tariffs and denial of entry to ports as an unreasonable and unjustified response. Nevertheless, they would be willing, in any investigation of such matters which involved their carriers and where relevant material and information was located within their jurisdiction, to enter into discussion with the United States authorities, with a view to finding a solution which would put an end to unfair and discriminatory trading practices in a manner compatible with the law and practices of both sides.

Mr. BANK. This note makes reference to the legislation. It points to certain aspects of it on which they have questions. That is one aspect.

The second is I think in recognition of a dedication by all agencies, or at least an increased dedication by a number of agencies in the U.S. Government to requiring that all operators operating in U.S. trades operate under U.S. law. This is manifested in the recent Justice Department antitrust investigation involving both U.S. and foreign flag operators and in fact statements made by many leaders—maritime and Government leaders in the United States.

I think, Mr. Chairman, there's going to be a closer—or shall we say an increased—amount of discussions and hopefully cooperation in trying to resolve some of these problems which exist when sovereign laws exist on one side of a trading spectrum and again exist in conflict on another side of the trading spectrum.

Senator INOUYE. As I recall, when the Celler committee had its long hearings some of these countries came out with similar statements if you look back in the file, and then interest died. Would this be the situation again?

Mr. BANK. Let's hope not, Mr. Chairman, and again, we stand ready to work with you if this does occur.

Senator INOUYE. The committee will stand in recess.

[Recess.]

Senator INOUYE. Please proceed, sir.

Mr. BANK. Thank you, Mr. Chairman.

We believe, however, that a clear expression of congressional concern over the problem of rebating, which will be provided by these hearings and others that will take place in the House, would enhance serious efforts by the concerned agencies to seek the cooperation of foreign governments, and thus could provide the basis for a more fruitful investigation.

Moreover, we are concerned that the U.S. courts might be reluctant to uphold the imposition of drastic sanctions on firms engaged in the foreign trade of the United States where the firms' inability to comply with the FMC orders stemmed from prohibitions under foreign laws. In similar situations, the courts have been sensitive to the principles of international comity, which require each sovereign in the exercise of its jurisdiction to give proper weight and effect to the legitimate interests of other States.

Mr. Chairman, the Department of State is fully prepared and looks forward to working with your committee and its staff, the Federal Maritime Commission, and other agencies in order to formulate a joint plan of action to confront and resolve the serious problem of rebating in our ocean commerce. And that concludes my prepared statement, Mr. Chairman.

Senator INOUYE. Mr. Bank, I thank you very much.

What countries have laws prohibiting rebating and malpractices?

Mr. BANK. I don't believe any countries do, Mr. Chairman. We are quite unique in the regulatory aspects of international ocean shipping. Our FMC is unique in the world.

Senator INOUYE. I have been told that the Japanese have this in their laws.

Mr. BANK. Well, regarding illegal payments of various sorts I'm sure there exists legislation or laws which prohibit illegal payments of many different varieties in a lot of countries. Although some of them may affect shipping, it is doubtful if they do so in the same ways as under our laws and in the same context with investigatory and prosecutory powers in a commission. I don't believe such laws as ours exist anywhere else in the world.

Senator INOUYE. If I may ask a question not relating to rebating but related to shipping, what are your thoughts on so-called cargo preference laws that are now being passed by other countries? Saudi Arabia has it. Kuwait has it. Venezuela has it. Certain South American countries have it for their trades.

Mr. BANK. Generally, Mr. Chairman, of course, we don't like to comment on individual laws, but basically on the ones you mentioned, it's been the feeling of the Department generally that competition and the ability of the U.S. operator to operate in a certain trade and fully in that trade in an attempt to carry as much cargo as the U.S. operator can carry is a goal which we all seek and which we strongly stand for.

In regard to the individual cargo preference laws, one must take a look at them to see whether they are based on a concept of government-controlled cargo, government-compelled cargo, and government-financed cargo.

Senator INOUYE. Oil, for example?

Mr. BANK. Well, again, regarding oil, as with any other commodity, it depends on who controls the oil, whether it's private or whether it's Government controlled. But generally, where the cargo preference laws of a particular country inhibit competition or the ability of the U.S. operator to successfully compete for and to carry cargo in our own trade, of course we do not approve of those laws and we have indicated our desire with those governments that provisions be made such that U.S. operators do have the right to keep on carrying this cargo.

Senator INOUYE. Have you been successful?

Mr. BANK. Yes, we have, in a number of situations.

Senator INOUYE. Where?

Mr. BANK. Chile was one case in which there were some problems. We have had certain situations in South America with certain legislation and regulations. I refer specifically to Argentina and Brazil where we, meaning the Department, along with the Maritime Administration in the Commerce Department have succeeded through discus-

sions and diplomatic negotiations in having those governments reexamine their provisions and thereby permit U.S. operators to operate as fully as they had prior to those provisions were enacted. There are a number of other situations elsewhere. There were such situations in Italy and in Yugoslavia. We have been somewhat successful in the Philippines, although there's an ongoing problem in the Philippines. Turkey was such a situation a number of years ago as well.

Senator INOUYE. I'm certain you're aware of the activities of the Baltic Steamship Co. and VESCO and their price cutting.

Mr. BANK. Yes; I am.

Senator INOUYE. Keeping that in mind, do you think that we got a good deal in the Soviet grain deal as it applies to shipping? Because if you will recall, under that deal it was one-third American ships, one-third Russian ships, and one-third other ships, provided we open up 43 of our ports to Russian vessels.

Mr. BANK. Mr. Chairman, the U.S.-Russia maritime agreement of October 1972 which was extended in September or December of 1975 covered, of course, a lot more than the question of facilitating the carriage of grain between the United States and the Soviet Union. There were many quid pro quos in that agreement.

Senator INOUYE. What did we get for the 43 ports?

Mr. BANK. Well, under the provisions of that agreement, 40 ports in the United States and 40 ports in the Soviet Union were opened to the vessels of the other country. The Soviet vessels, for example, may call at those 40 ports with 4 days' advance notice. As part of that same agreement, in the carriage of the bilateral trade between the United States and the Soviet Union, U.S.-flag operators were guaranteed one-third carriage of all items in the bilateral trade.

So what we received, if you want to put it that way, Mr. Chairman, for opening U.S. ports to Soviet vessels was the guaranteed carriage of one-third of the cargoes in the bilateral trade.

Between 1950 and 1972, Mr. Chairman, U.S. ports on the gulf, the east coast, and the Great Lakes had basically been closed to Soviet-flag vessels due ot labor union boycotts of Soviet vessels during the Korean war.

In the negotiation and the discussions on the creation of a U.S. position prior to the U.S.–U.S.S.R. maritime agreement of 1972, consultations were held between the various agencies in the U.S. administration doing this negotiation, primarily the Maritime Administration and various segments of the U.S. maritime industry. Maritime labor unions indicated, as did the maritime industry itself, that because of the nonmarket, common state control by the Soviet Union of a large degree of its cargo, both import and export, it was desirous—in fact, we felt, required—that the U.S. side obtain as part of the agreement a guarantee of significant carriage by U.S.-flag vessels. That was obtained and that was, in fact, required.

Senator INOUYE. How many ports were opened to us?

Mr. BANK. Excuse me, Mr. Chairman?

Senator INOUYE. How many Soviet ports were opened to us?

Mr. BANK. Forty ports.

Senator INOUYE. And are we permitted to do cross-trading?

Mr. BANK. Yes, Mr. Chairman; however——

Senator INOUYE. We don't?

Mr. BANK. Well, there isn't very much cross-trading done by U.S.-flag operators generally, and there aren't very many U.S. operators that generally call on Soviet ports in the bilateral trades.

Senator INOUYE. You were aware of that? In the negotiation you were aware of that, weren't you?

Mr. BANK. Well, Mr. Chairman, going back to the time of 1972, it was anticipated as part of an entire array of agreements with the Soviet Union that this trade agreement would also be concluded with the Soviet Union which would have increased to a significant degree the bilateral trade between the United States and the Soviet Union. For reasons which I'm sure you're aware, the Soviet Union chose not to continue or not to implement or participate in this trade agreement.

Senator INOUYE. Do you think it was a fair deal?

Mr. BANK. I think with proper application and with proper control over the agreement, both the shipping interests of the United States and the Soviet Union can benefit from this agreement.

Senator INOUYE. They opened 40 ports to us which we don't use, and we opened 43 ports to them which they use, but I suppose you did what was right for the country.

Mr. BANK. Well, Mr. Chairman, if I may say so, we carry a lot of grain. We have carried a lot of grain, in fact more than the Soviets carry, which we otherwise would not have carried save for that agreement. The 40 ports on each side are, of course, a part of the agreement, and our vessels do call at significant Soviet ports both in the carriage of grain and the carriage of the bilateral line of cargoes as well. The third-flag carriers' cross-trade by the Soviet Union is a situation of which we are quite aware. I think, as you and I discussed after our hearing about 2 years ago, that we are quite aware of the situation.

Senator INOUYE. Can you describe the nature of your discussions or the steps you have taken with those countries having what I refer to as blocking statutes?

Mr. BANK. Mr. Chairman, we have had a number of discussions with Government officials of a number of these countries.

Senator INOUYE. At what level, sir?

Mr. BANK. At the Deputy Assistant Secretary level, and I suspect and in fact know one aspect of the antitrust investigation which I referred to was at the ambassadorial level on the side of the foreign governments and the Under Secretary level at the State Department. The discussions, as I said before, centered and have centered on antitrust problems that exist in regard to foreign operators in the United States. As I said earlier, Mr. Chairman, we have never been asked by the SEC or the FMC to participate in any rebating investigations which would have involved or could have involved the imposition of the elimination of these foreign laws.

Now, our discussions in regard to these antitrust situations indicate, and we have indicated to the foreign governments involved, the requirements under our laws that operations by foreign operators and businesses comply with U.S. laws. As I said earlier and as I said in the prepared statement, Mr. Chairman, the procedure is moving, and I think we have some cause to be optimistic in regard to setting up a regime, setting up a procedure, whereby an obvious conflict of laws between two sovereigns can be avoided.

Senator INOUYE. Without objection, at this juncture, I would like to make part of the record a copy of a letter from the Secretary of State, dated July 25, 1977.[3] You don't hold that now, do you?

Mr. BANK. Hold what, Mr. Chairman?

Senator INOUYE. That it has no mandate in this area?

Mr. BANK. Well, the mandate of which I believe the Secretary spoke and to which I made reference before, I define as an independent, positive requirement or jurisdiction to investigate and to monitor and to in other ways root out rebating. We stand ready as we pointed out——

Senator INOUYE. And you have no precise information on rebating?

Mr. BANK. No; we don't, Mr. Chairman, have the precise information on rebating. I have a four-man staff.

Senator INOUYE. How does the State Department enter into negotiations with these countries if you don't have any information on rebating?

Mr. BANK. Through cooperation with the FMC, Mr. Chairman. That agency is the agency which has this information and in a cooperative effort with them and dealing with them and having participants——

Senator INOUYE. So they are the negotiators?

Mr. BANK. No, we are.

Senator INOUYE. I thought you said the Under Secretary level.

Mr. BANK. No. The negotiating teams can be made up of more than one agency and the information and the resources with the FMC go directly to the question of rebating. We are not the guardians of the rates which are filed. The recipient agency is the FMC. They know what the rates are and should be and they are the ones to whom are directed the reports of rates or, shall we say, something less than rates which are charged or participated in by shippers and shipowners.

Mr. Chairman, with regard to this matter, we have informed the FMC—and they have also been aware—that we do stand ready to work with them in this. As I described to Mr. Daschbach when he did call me, we never, of course, received an official request to testify at those hearings last March. But when Mr. Daschbach called me we discussed on the telephone for a period of time what we could contribute and we came to a conclusion jointly that perhaps for those hearings—then in the initial stage—our contribution would probably not be required and we decided to get back to each other if it was. I spoke to Mr. Daschbach afterwards and the conclusion was reached by both of us that at that stage the State Department probably would not be a prime candidate to be a witness.

Senator INOUYE. I can understand that the State Department may not have the enforcement function statutorily assigned to you, but don't you believe under the policy of the United States you have a mandate at least to make yourselves aware and investigate rebating?

Mr. BANK. Well, Mr. Chairman, when we become aware, not only do we look into it and gather as much information as we can, but our primary function is to report what we learn independently in this regard to the FMC which is that agency which is responsible for

[3] See p. 147.

this area. I believe our more strict interpretation, or even a general interpretation of our mandate is one of cooperation with the other agencies and in dealing with the foreign governments involved in a joint action with the other agencies involved.

Senator INOUYE. Mr. Bank, there was a task force called a domestic council maritime task force in the last administration. Were you a member of this domestic council maritime task force?

Mr. BANK. Yes, we were, I believe.

Senator INOUYE. And did you receive copies of all the documents which were published by that task force?

Mr. BANK. I don't know whether we received all of them. I remember receiving some documents from that task force.

Senator INOUYE. Was the regulatory functions of the FMC a matter of concern to that task force?

Mr. BANK. I believe it was.

Senator INOUYE. I'd like to at this time, without objection, place in the record a copy of the memoranda and attachments dated September 25, 1975 [4] which go into some detail on what this task force was to consider. I believe, among other things, it was to suggest to the FMC changes in practices such as interpreting dual rates as contrary to public interest, suggesting legislation for minor changes in the law requiring verbatim transcripts of all discussions between carriers as suggested by Mr. Donald Flexner, to radical changes like removing antitrust immunity and abolishing must functions of the FMC.

So you did have some discussion on this matter.

Mr. BANK. Yes. If I recall, there was discussion in an interagency working level task force.

Senator INOUYE. Now was there any representative from the FMC on that task force?

Mr. BANK. I don't recall. We did not chair the task force. I don't know whether the Commission was on it or not.

Senator INOUYE. I can tell you that you had none, but you were discussing a lot of FMC matters, but there was no FMC representative. Nor did you have any member from the industry, the maritime industry, on the task force. I'm just curious. Why did you not—you were not the man in charge, but why did you not include the FMC as part of this task force?

Mr. BANK. If I recall, as you said, Mr. Chairman, this was a task force directed by the Domestic Council at the White House, and I would only have to guess at the reason why those who supported the task force might have done that, and that would be that it included only those agencies within the executive branch. But as you pointed out, I wasn't the one leading this task force nor was the Department the agency leading task force. If I recall, the membership of the task force solely consisted of executive branch agencies; the FMC, being an independent regulatory agency, was not involved. If I recall, the task force never came to a conclusion and I just wondered, even towards the end of the task force activities, whether they had intended to call the FMC to participate in it or in fact to seek assistance and advice from the industry. I don't know.

[4] See p. 147.

Senator INOUYE. I have been sitting on this committee now for about 10 years I believe and I recall, that with respect to many of the proposals initiated by the Commerce Committee, the testimony of the State Department which included very similar phraseology, and in each case where we would suggest that other steps be taken, the Department would say it was because the proposal would result in retaliation by other countries. Are you really concerned about retaliation?

Mr. BANK. Generally, Mr. Chairman, I think retaliation is a term that has to be used in a specific sense and very sparingly. Often when people make reference to State Department positions and characterize them with retaliation, often we mean emulation, which would in the long run—even in the short run and the middle term—create a negative result for U.S.-flag vessels.

Senator INOUYE. Should we emulate the other side?

Mr. BANK. Well, in many ways I think it's a question of taking a look at the specific situation. We use the term retaliation in our testimony in this case, and advisedly and properly so I believe, because we fear it; and I believe other agencies who might testify before you and the industry might feel the same way, that either through government activities or actions or existing laws in some countries or through labor union or other actions that it would be retaliation.

Yes; in this case, we do fear retaliation. I understand and I agree with you, Mr. Chairman, that the United States is a large trading country and we can look upon small countries and upon other trading relationships in a way to say, well, how can they retaliate against us? But retaliation can come in small or certain segments, in areas which might hurt our industries which we are trying to protect. We honestly feel that if certain ports in the United States were closed to certain foreign flag operators that U.S. operators in those same trade lines would face the retaliation of closed ports themselves. It is not as wild as it seems. I think it's a very realistic prospect.

Senator INOUYE. Well, a few years ago we came out with our first cargo preference bill. At that time the State Department said, "Please don't do it because other countries will retaliate," and while we are concerned with the oil that was being shipped into the United States, we had our concern for the environment also. Some of these ships that were carrying petroleum to the United States were not suited for certain conditions and, as a result, we have had some very devasting accidents on our high seas.

Now when Kuwait came out with the law that would mandate that 60 percent of their oil be carried on their ships, and when Saudi Arabia did the same and Algeria and Venezuela, what was the stance taken by the State Department?

Mr. BANK. Mr. Chairman, in regard to those specific laws and others, to which I made reference before, we must look at the specific case. First, whether a U.S. entity involved is being injured or, even before that, Mr. Chairman, to see whether the laws, although they may be on the books, are in fact being implemented and if they are being implemented are they being implemented to the detriment of U.S. interests? In those cases—you mentioned a variety of cases—a number of those countries do not even have the tonnage at the present time to carry the share that they desire nor have U.S. entities, U.S.-flag operators, in-

dicated that they are being forced out or being prevented from entering those trades because of those cargo preference laws.

We recognize, of course, as all countries recognize, the right of other countries to pass certain legislation and we have to look at these individual cases one at a time. And we have in those situations. Moreover, in a number of cases that you mentioned, and I believe in all of them, the oil companies or exporting entities in those countries are government entities and in relation to their government export policies enjoy treatment analogous to what we have in the United States under the 1955 cargo preference laws which involved government owned, financed or impelled cargos. Regarding the percentages involved, ours are even greater in government cargos than those of the countries that you mentioned. For example, 100 percent of all Ex-Im Bank cargoes have to go on U.S.-flag vessels, unless there's a waiver in which case up to 50 percent may go on the flag vessels of the nations receiving those cargoes if those nations do not discriminate against U.S. shipping. Where those cargo preference laws, whether in oil or bulk carriage, affect U.S.-flag vessels to their detriment, we have been not only quite aware but quite alert and we have participated to a significant degree in the elimination of those laws or at least the effect of those laws, I hope to the satisfaction of the U.S. carrier involved. We've worked very closely with the U.S. carriers and U.S. maritime interests in trying to resolve these problems on a case by case basis.

Senator INOUYE. Do you believe that we have a cohesive maritime policy in the United States, cohesive in the sense that all of the Departments involved are working together for a single aim?

Mr. BANK. I think, Mr. Chairman, various agencies and various departments, of course, have their particular interests or the interests under their mandates involved. Whether we have a cohesive policy or not I suppose depends on the particular administration which is in the White House at the time and the desire to bring this policy together.

There is a procedure of which I'm sure you're very aware that the various opinions and thoughts of the various agencies are brought together under either the Office of Management and Budget or White House Office to try to determine on a specific piece of legislation or on a specific policy what is the administration position. Whether we have a cohesive overall policy or not, I don't know. I can't really say. What is the policy and what should be U.S. policy I think is a process which is distilled, which is refined as legislation and other policies are created.

I might say, though, Mr. Chairman, I think from the point of view of the Department of State, that our definite policy is the promotion of the U.S.-flag merchant marine and the protection of the U.S.-flag merchant marine abroad from discrimination or from activities which limit its activity by virtue of discrimination and other activities of foreign governments or lines to the detriment of the U.S. carrier.

Senator INOUYE. Now, you have suggested that our sanctions are not advisable because they are too drastic, and foreign countries would be quite disturbed; and you have suggested that some alternative procedure should be set up, and that you and FMC can work together with Congress to bring up this alternative.

Did you make any suggestions to the Celler committee or the Alexander committee or to any other committee on how to deal with these problems?

Mr. BANK. I'm not aware of any. I don't recall. We can look into that, Mr. Chairman, and report back to the committee on that.

Senator INOUYE. Do you believe that the steps to date will significantly—that's the word we use—alleviate the problem?

Mr. BANK. I would hope that it would. As I said before, Mr. Chairman, if these steps in cooperation with the FMC and our discussions with foreign governments are not successful in providing the investigatory agencies with that information which is required to root out rebating, then we and the Commission, and I'm sure your staff, will work together in a way to try to get results that will succeed in resolving this problem.

Senator INOUYE. Well, I agree with you that the best possible way to resolve this would be by friendly consultation and negotiation, but obviously it hasn't worked.

Mr. BANK. Mr. Crook, from our Office of Legal Adviser, suggests that perhaps a reference to a procedure that's ongoing in the OECD might be important in this regard.

Mr. CROOK. Mr. Chairman, you made reference to the hearings of the Celler committee, and of course, you were, I'm sure quite, familiar with the significant investigatory efforts of the FMC in the 1960's. In looking at that experience, I think you're well aware that it was the efforts by the Commission some 15 or 16 years ago that really prompted the enactment of a number of these laws against compliance with foreign discovery orders.

You may also recall, though, Mr. Chairman, that in the case of that particular FMC investigation in the early 1960's, we were successful in negotiating with a large number of foreign countries under the auspices of the Organization for Economic Cooperation and Development, the OECD, a regime under which the 14 foreign countries agreed to provide the FMC with a wide variety of information which the FMC required for its investigatory purposes and which those countries had theretofore refused.

It seems to us, Mr. Chairman, that this may be an interesting precedent of the kind of cooperative arrangement that might be possible through negotiations. These laws, Mr. Chairman, I think, do reflect more than just determination on the part of the foreign governments concerned to protect wrongdoers who happen to be their citizens. I think they reflect a sincere conviction on the part of many of these governments that it is improper for the United States to seek to regulate conduct within their territory, to seek to compel discovery of materials physically located within their territory.

We at the Department of State feel—and Congress, of course, does not share that view—but I think we have to recognize the sincerity and intensity with which it's held by a number of governments, and that, sir, is why we——

Senator INOUYE. Did the State Department object to sharing information with the Japanese Government in the *Lockheed* case?

Mr. CROOK. No, sir; we did not.

Senator INOUYE. That was all right for the United States to share information, but you think it is improper for foreign governments to share information with us?

Mr. CROOK. I do not think so, sir; no.

Senator INOUYE. Didn't you just say that you quite agree with foreign governments exercising their sovereignty and not sharing their information with us?

Mr. CROOK. No, sir, that was not what I said. What I said was we have to understand that there is reason that, by their rights, they believe they are doing a proper thing, a thing that is or may be required for the protection of their sovereignty.

Senator INOUYE. So the bottom line is, after the Celler hearings you had a lot of discussions and consultations, but instead of reducing malpractices, the record seems to indicate that since that time malpractices have increased. I don't know if that's a coincidence, but that's the fact.

My question is, did your consultations work?

Mr. BANK. Mr. Chairman, the consultations with regard to the provisions under the OECD didn't deal necessarily with the same malpractice situation with which we are dealing today. In fact, if malpractice—and I agree with you—has increased, I don't think it's a direct result of those early negotiations, or, if you want to characterize them this way, of those negotiations not reached in this same area. If I may repeat, Mr. Chairman, in regard to the actual investigations and prosecution of malpractices by the FMC, the Department, from the time of this OECD settlement, has yet to be sought out to discuss with foreign governments, under OECD auspices, their laws on the specific malpractice allegations to which you refer. In fact, in the discussions with the FMC recently, even prior to the introduction of your bill, we have set forth a number of possible guidelines as to how we could work together in trying to obtain compliance with certain requests by foreign governments.

Senator INOUYE. Well, I wish I could tell you that I'm pleased to rely upon the efforts of the State Department, but to date the facts as presented to this subcommittee would indicate that notwithstanding the valiant efforts on the part of your agency, the prejudicial malpractices which are being carried out have not diminished. In fact, they have increased.

Personally, I'm not certain of what would be the best solution, but I can assure you that this Senator did not introduce the measure just for the sake of having hearings. I can assure you that we are going to do something about this, and if the agencies which are mandated to carry out the policy of the United States somehow refuse to do so, I can assure you that the full committee although the members are not sitting here would concur with this subcommittee that something has to be done. We do not want to come out with steps that would be inimitable to the best interests of the United States. Therefore, I would hope that your agency will cooperate with us and come up with a bit more realistic type approach.

As I said, the time for talking is ended. It's time for some action. We don't want to take drastic action, but I think action should be taken. So with that, I'd like to thank you very much for coming here this morning. You have been extremely helpful and if I may I'd like to

submit to you a full set of questions that we have for your consideration and response.[5]

Mr. BANK. Thank you, Mr. Chairman. We would be happy to answer them.

Senator INOUYE. Thank you very much.

Our next witness is the Deputy Assistant Secretary for Trade and Investment Policy of the Department of Treasury, Mr. Gary Hufbauer.

STATEMENT OF GARY HUFBAUER, DEPUTY ASSISTANT SECRETARY FOR TRADE AND INVESTMENT POLICY, DEPARTMENT OF TREASURY; ACCOMPANIED BY HENRY BERGHOEF, OFFICE OF TRADE POLICY; WILLIAM ANAWATY, OFFICE OF GENERAL COUNSEL; ALAN FRASER, INTERNAL REVENUE SERVICE, OFFICE OF CHIEF COUNSEL; AND ARNOLD GORDON, INTERNAL REVENUE SERVICE

Mr. HUFBAUER. Thank you, Mr. Chairman.

I would like to introduce by colleagues. On my far left is Mr. William Anawaty with the General Counsel's Office of the Treasury. Next to him is Mr. Henry Berghoef from the Office of International Trade; and on my far right is Mr. Arnold Gordon with the Internal Revenue Service; and next to him is Mr. Alan Fraser with the Internal Revenue Service.

Mr. Chairman, the reason there are so many of us is not that we know a great deal about this area, but that we in fact have a great deal to learn and perhaps five of us can learn better than one.

I would like to discuss with you the Treasury Department's views on S. 2008. You have a copy of my full statement and I will just attempt to summarize it.

Senator INOUYE. Mr. Hufbauer, you have been sitting here while we were having this discourse with the two departments. In keeping with the essence of our discussions, can you tell us the views of your Department?

Mr. HUFBAUER. Yes; Mr. Chairman. The Treasury Department has two different ways of looking at this particular bill. The first is from the viewpoint of general economic policies, and the second is from the viewpoint of enforcement actions and the operating arms of the Treasury Department, specifically the Customs Service on the one hand and the Internal Revenue Service on the other.

I would like to start off with the general concerns that this legislation raises. In terms of overall economic policy, the Treasury takes a dim view of price-fixing arrangements in any sector of the economy. To our way of thinking liner conferences do represent an effort to place a floor under ocean shipping rates.

As you know, sections 16 and 18(b) of the Shipping Act of 1916 prohibit common carriers by water in our ocean trades from allowing any person to obtain transportation or related services for property at less than the published rates in their tariffs on file with the FMC. These tariffs are in turn specifically agreed upon by the liner conferences.

[5] See p. 149–51.

The liner conference arrangement represents an exception to the general prohibition against price-fixing schemes contained in the Sherman Antitrust Act as interpreted by the courts.

Senator INOUYE. Do you agree with this interpretation?

Mr. HUFBAUER. Sir, I do not agree with the philosophy of this exception.

Senator INOUYE. It should be wide-open competition?

Mr. HUFBAUER. I would like to spend more time on alternatives than simply say wide-open competition, but I would say I do not agree with this exception.

We do not claim to be experts on maritime affairs, but we do believe that the national economic interest is best served when the market system is allowed to operate with as few constraints as possible. Attempts to reduce or restrict competition inevitably lower national welfare in the aggregate and contribute to wasteful inefficiencies in our economy.

We are familiar, Mr. Chairman, with the arguments that transportation is a unique sector, a quasi-governmental service that needs special protection or regulation by the Government. However, the Treasury is not convinced of the merits of this argument. Evidence is beginning to show that regulated industries are less efficient than they would be otherwise. Businessmen, economists, and Government leaders alike are increasingly advocating that we experiment with expanded competition and less regulation in transportation.

As economists, we are not surprised that illegal rebates, in effect a black market for shipping, have sprung up in response to liner conference agreements, which often result in higher prices than the market will support. If prices are artificially high, someone will try to undercut them, either through legal or illegal actions. This is not an apology for rebates. But we think the reasons they occur are fairly evident and have been set forth in numerous studies, including the hearings you held in March.

Mr. Chairman, I realize that these hearings that you are having today and which you have had in the past are not designed to consider whether or not we should abolish liner conferences. In fact, the hearings are designed to see how the powers of governments can be used to strengthen those conferences. We do feel, however, that since conferences are a sanctioned cartel, they impose economic costs on the Nation, and that strengthening them will very likely increase those costs. We believe that this broad policy consideration does have a bearing on any legislation which you may recommend.

Senator INOUYE. Do you believe if we had abolished at the very outset the liner conferences or had given no exceptions to the law, and also did not provide these subsidies for operation and for construction, do you think we would still have a martime industry remaining in the United States?

Mr. HUFBAUER. Mr. Chairman, there are two parts to that question. One is the liner conference part and the second is the subsidy part of the Martime Administration provisions. I'd like to focus my answer to the liner conference portion of the question.

It seems to me unlikely, in light of the record that I have read as set forth in your committee hearings and in the Justice Department study, that the liner conference arrangements have in fact strengthened

American participation in the trades. There is now 60 years of experience with the Shipping Act of 1916. The record of illegal rebates over this period of time is replete. Indeed, the record seems to indicate that American vessels have participated extensively in these rebate practices.

So it's hard for me to conclude that the liner conference side of Government participation in this industry has strengthened the American merchant marine.

Briefly, however, without going into the complex details on the subject, I think it would be quite fair to say that the subsidy side of the program has had a very substantial effect on our participation.

Mr. Chairman, I would like to turn now to some of the specifics involved in the enforcement of the legislation; that is to say, the administrative aspects.

The language of the bill leaves unclear whether an offending vessel is to be physically denied entry into a port by the Coast Guard, or whether its offloading would be prohibited by the customs service. Assuming that enforcement is assigned to the customs service, we do not anticipate that unusual enforcement problems would result from the proposal to close our ports to specific vessels whose owners refuse to cooperate with Federal Maritime Commission investigations. From a policy point of view, however, we are concerned about the possible repercussions of such draconian actions on our international trade. You have explored those repercussions at some length with the gentlemen from the State Department, and I have little to add on that score.

I would note, however, that the legislation might create the anomaly of closing U.S. ports to U.S.-flag vessels, thereby creating a peculiar category of stateless vessels. That might be an aspect that you would wish to address.

Senator INOUYE. Well, we had hearings on another measure, S. 2083, relating to oil pollution liability. It's not in this, but in that measure we had specific provisions where the Secretary shall deny entry to any port or place in the United States or navigable waters and detain at the port or place in the United States from which it is about to depart or any other port or place in the United States, any vessel subject to this subsection. The administration, if I recall, supported this section here, and I don't know who's going to do this—the Coast Guard or the U.S. Marines, but it says here, "It will specifically deny entry."

Mr. HUFBAUER. Yes. Since that is a pollution type of measure, perhaps the Coast Guard would be the more appropriate vehicle in that case, and perhaps, too, the more appropriate enforcement organization in the present case is the Coast Guard. We would just ask for clarification in the legislative record as to which agency of Government has the enforcement responsibility.

Mr. Chairman, if it's convenient, I would like to turn now to the effects that this bill would have on the enforcement of tax laws by the Internal Revenue Service. There are several aspects which would be of concern.

First, section 3(d)(1) of the bill would confer immunity from criminal prosecution under the laws of the United States arising from

any illegal rebate voluntarily disclosed to the Federal Maritime Commission within 1 year of the bill's date of enactment. As you made clear in the March 1977 hearings, Mr. Chairman, on page 57 of the record, this provision is intended to confer immunity for violations of any Federal law, including tax or foreign currency movement reporting laws, related to or arising from rebate violations under the Shipping Act. We believe complete immunity is far too broad. We support the Justice Department in favoring a more limited grant of immunity and defer to Justice for appropriate statutory language to accomplish that end. We would not like to see an immunity where taxes and related penalties were completely eliminated.

Senator INOUYE. I can assure you it's not the intention of this committee to release any violator from the provisions of the tax laws and paying the penalties for violation thereof.

Mr. HUFBAUER. Thank you, Mr. Chairman.

I would just like to briefly survey the dimensions of the tax aspects, and I do have two experts with me to go into the details as you may wish.

If there is a rebate given, the recipient of a rebate should either declare that as income under section 61 or it should be reflected as a lower cost. Any person failing to report a rebate as income or failing to reduce costs commensurately is liable for payment of taxes due. Similarly, the payer of a rebate may not deduct the payment as an ordinary and necessary business expense or list it as a cost that reduces its gross receipts if such payment subjects the payer to criminal penalties or the loss of a license or privilege to do business. Since section 16 of the Shipping Act provides that persons paying illegal rebates may be charged with a misdemeanor and fined, and since the proposed bill would authorize the suspension of the right of liners to use U.S. ports, payment of a rebate would not be allowed as a deductible expense of the liner or a cost that reduces its gross receipts. If a liner violated these provisions, the IRS should be able to collect any taxes and penalties due. Therefore, we conclude that the payer of the rebate, the shipping company if you will, cannot treat the rebate as a deductible expense.

Senator INOUYE. So a misdemeanor is covered——

Mr. HUFBAUER. Or the loss of privilege to do business, and that comes later when we speak of the other aspects of this particular bill which would deny port entry. So we have possible violations both by the recipients of the rebates and the payer of the rebates, and we believe that whatever other immunity you may confer, the IRS should be able to collect any taxes and civil penalties that might arise under these types of schemes.

Senator INOUYE. Just for clarification of that point, you are suggesting under this use immunity that was originally proposed by the Justice Department, if a company, the payer, should under advice of counsel, submit a return and list on that return rebate payments, and so indicate that they have made x number of dollars as rebate payments——

Mr. HUFBAUER. If I may interrupt, Mr. Chairman, I think the critical question is: has the payer claimed those as deductions?

Senator INOUYE. As a business deduction?

Mr. HUFBAUER. Yes.

Senator INOUYE. Now should he be, in addition to having to pay the taxes, charged with other sanctions and other penalties?

Mr. HUFBAUER. Let me try and answer, but if I'm in error, I will ask my colleagues to correct me. If a person has disclosed on his return a rebate of x amount, ordinarily I think the approach of the IRS would not be to attempt to impose a civil penalty where there is full disclosure. There is no fraud in that case. There's just an ignorant filing of the return. If there is no disclosure, however, it does begin to raise civil fraud aspects—civil and criminal perhaps, but the first part of my answer stands.

Senator INOUYE. I'm talking about a voluntary disclosure.

Mr. HUFBAUER. If the person on his return——

Senator INOUYE. Without any pressure of grand jury investigation or IRS investigation, advice of counsel says "Go ahead file this,"——

Mr. HUFBAUER. If on his original return he listed this item or indeed even on an amended return? Now obviously if the amended return was done with some breath of hot air coming from some other agency, that would raise another question; but completely voluntary, then I don't think that gets into the civil penalty area, Mr. Chairman. But there still would be the tax question. He would not have had an allowable deduction and the tax would be disallowed.

Senator INOUYE. So if there's no breath of hot air and if the disclosure is made voluntarily, there's no civil penalty?

Mr. HUFBAUER. Yes. That's a fair summary.

Senator INOUYE. The same thing would apply with the payee, if he voluntarily discloses?

Mr. HUFBAUER. If he reflected the rebate in terms of either income or showed it as a reduction in his costs, there would be no problem with voluntary disclosure. In that case, presumably there would have been no understatement of tax to begin with.

Senator INOUYE. Even if the payment received was illegal under the laws of the United States?

Mr. HUFBAUER. As I understand—and please correct me if I'm in error in this—I believe it's not illegal as received by the payee. It's illegal for the purposes of giving a payment, but I'm not sure that a penalty attaches under the Shipping Act to the payee. But I don't pretend to be an expert on the subject.

Senator INOUYE. I believe it applies both ways.

Mr. HUFBAUER. Well, in that case, we are closer to a person earning other kinds of illicit income, and there are many cases of this. As long as the person reports his income in full—gambling income would be a case in point—the IRS doesn't have a particular complaint.

Mr. FRASER. We would certainly think it's illegally derived income. The fact that it is an illegal gain would certainly consider this possibility.

Senator INOUYE. If I may repeat again, if the payer voluntarily makes a disclosure of illegal rebate payments without the breath of hot air on the back of his neck, he would not have to suffer civil penalties?

Mr. FRASER. Civil penalties would ordinarily not arise. I think you have to look at the entire tax situation clearly, but that's the general rule. They only go after civil penalties where the case is a hard one.

Senator INOUYE. Please proceed, sir.

Mr. HUFBAUER. Now, Mr. Chairman, I would like to turn to an issue which was raised, and that is the cooperation between the IRS' activities and the investigations which the Federal Maritime Commission may undertake in attempting to ferret out these rebates. Section 6103 of the IRS Code does impose statutory limitations on the IRS, and there are four aspects—somewhat benumbing when you first come across them.

Aspect No. 1, an IRS auditor who discovers an illegal rebate through studying a tax return or the taxpayer's books and records cannot report that information to the FMC. With an ex parte court order, however, the FMC would be able to obtain such information for nontax criminal purposes. On the other hand, the IRS could report to the FMC information bearing on the violation of a criminal statute learned by an auditor from third parties in the course of investigating a taxpayer. Further, the FMC could request third party information from the IRS bearing on a criminal investigation. So those are four types of provisions which would apply under different factual circumstances.

As you know, Mr. Chairman, the Shipping Act of 1916 provides that civil penalties may be imposed. There is also a provision for criminal penalties, but civil penalties seem to be the more normal procedure.

The bill under immediate consideration also proposes civil sanctions. This feature limits the extent of feasible cooperation between the IRS and the FMC under established—and I would add, well-thought-out—procedures. Further, I would just point out, in the context of your colloquy with the Justice Department, that if the immunity is narrowed to use immunity under the Shipping Act a nice legal question might arise as to whether even civil penalties remained, and the presence or absence of these penalties could affect the application of the tax laws. I don't think we can solve all those complex interactions this morning, but it would require cooperation to do the drafting appropriately.

Turning to a more general point, Mr. Chairman, I would like to emphasize that the Treasury does not favor the use of tax investigations or tax return information to advance the prosecution of nontax offenses. Thank you.

Senator INOUYE. I wish to thank you very much for your assistance, Mr. Hufbauer. As I indicated to other witnesses, we intend very seriously to go through with this or with some bill to be considered by the full committee.

Keeping that in mind, I would hope very much that you can join together with Justice and State and FMC and help this committee in coming up with something that you feel would be not only palatable but rational and meaningful. I would hate to have a bill that has no meaning and no effect because I'm convinced—others may not be—but I am convinced that rebating is a very serious problem and it has been working to the disadvantage of our fleet and I'm going to do my best to somehow bring an end to this. So whatever you can do in assisting us would be most appreciated.

I would like to, as I have with others, submit to you certain questions for your consideration.[6]

[6] See p. 155.

Mr. HUFBAUER. Certainly, Mr. Chairman.

Senator INOUYE. Thank you very much. We appreciate it.

Our final witness today is the chairman of the board of Sea-Land Service, Inc., Mr. Charles I. Hiltzheimer. Mr. Hiltzheimer, I'm sorry to keep you waiting so long. I notice that there's a vote in progress now, but let's start.

STATEMENT OF CHARLES I. HILTZHEIMER, CHAIRMAN OF THE BOARD, SEA-LAND SERVICE, INC.; ACCOMPANIED BY PETER M. KLEIN, VICE PRESIDENT, LAW AND GENERAL COUNSEL; PETER J. FINNERTY, VICE PRESIDENT, PUBLIC AFFAIRS; AND WILLIAM F. RAGAN, ATTORNEY

Mr. HILTZHEIMER. Thank you.

Mr. Chairman, my name is Charles I. Hiltzheimer. I am chairman of the board and chief executive officer of Sea-Land Service, Inc., our Nation's largest containership operator. I am accompanied today by Peter M. Klein, vice president, law and general counsel of Sea-Land, Peter J. Finnerty, vice president, public affairs, and William F. Ragan, of Ragan & Mason, our Washington counsel.

On March 18 I was privileged to appear before this committee to offer the views and recommendations of Sea-Land Service, Inc., concerning rebating in the foreign commerce of the United States subject to the Shipping Act of 1916. At the time of that appearance I described the rebate problem that is critical to the U.S. liner fleet and advocated the following urgently needed action:

1. Intergovernmental discussions aimed at obtaining cooperation of foreign governments to treat the rebating problem in an equitable and mutually acceptable manner. And I might add that these discussions in our belief should focus on the critical problem or objective of creating an acceptable environment within which both U.S. and foreign carriers can operate.

2. Legislation requiring all conferences to permit their members the right of independent action on pricing and terms of transportation services upon appropriate notice and opportunity for the conference to first act collectively to counter rebating.

3. Stronger enforcement of U.S. laws against foreign carriers so as to insure equality of respect for, and compliance with, the laws and equal exposure to the risks of failure to comply.

The witnesses who testified at the March hearings established a need for legislative action, and today the subcommittee sits to hear testimony on S. 2008, a bill sponsored by the chairman to meet the rebate problem, on what I understand to be an interim basis, to stimulate the FMC to continue its investigations and prepare long-term recommendations to Congress.

Sea-Land appreciates and is supportive of the purpose of S. 2008. Today we will propose some modifications which we think would make the bill more effective. With such modifications the bill will have our wholehearted support.

Mr. Chairman, at the March 18 hearing, I stated Sea-Land's belief that independent action is a proper remedy for today's rebating prob-

lems and is urgently needed until a better answer may be found. We still hold that belief.

Unfortunately, our proposal for independent action within conferences did not receive enthusiastic support from many other members of the shipping industry. I might state that the primary objection raised by most carriers was that independent action would destroy conferences. If Sea-Land believed that to be the case, we would certainly not recommend it.

In the hope that we might win such support or might learn of a better solution, we met with senior management representatives of other U.S.-flag liner companies under the auspices of the Liner Council of the American Institute of Merchant Shipping.

Over a period of months after the March hearings, attorneys representing various U.S.-flag lines strove to construct alternative legislative proposals which could gain the support of all American carriers. I concurred in Sea-Land's participation in those efforts.

Those meetings and discussions are the basis of my belief that the majority of American carriers will support S. 2008, either in total or, like us, with some suggestions for change. Above all, this general agreement as to the need for action and as to the essential character of the legislation is a very encouraging development.

We believe the pendency of this legislation and the ongoing FMC investigations into rebating have had a welcome dampening effect upon rebate activity. We also believe that all American carriers are striving to assure that they are now complying with the law. With adequate cargo available to all, it appears that foreign carriers are being extremely discrete in their behavior at this moment.

The FMC has pursued its investigations for more than a year, but, except for Sea-Land's voluntary settlement, has not yet been able to bring even one carrier investigation to completion and final resolution. In the same period only two shipper penalty settlements have been announced. One reason for this inability has been the lack of power to effectively induce carrier cooperation or compel foreign carrier production of documents.

The committee will recall my earlier testimony that many nations have established laws prohibiting or restricting their carriers from providing U.S. Government regulatory agencies access to business records. Some of those laws were enacted for the specific purpose of frustrating FMC investigations.

Recent newsstories have related the intransigence of Zim Israel Line in regard to document production, and Japanese carriers are said to also have refused to produce records.

It was in anticipation of just such refusals that the American lines concluded that the FMC should be given stronger statutory powers in malpractice investigations.

I wish to emphasize that Sea-Land acknowledges the clear need of the FMC for effective tools to compel foreign carrier compliance with U.S. law. However, if they are to be effective, such tools must have real world practicality and must not present an undue risk of foreign retaliation.

We think that the bill's provisions for accelerated hearings, for time limits on reaching decisions and for establishing a presumption

of proof of malpractices when a carrier or other person under investigation fails to cooperate with discovery demands, are all such effective and realistic tools.

On the other hand, we think that the mandatory and nondiscretionary tariff suspension and port closing powers are overly rigid and could, in fact, result in unintended harm to U.S. liner companies.

The method of combating rebating by foreign carriers must be simple, direct, certain, credible, and commercially effective to be a true deterrent. It must also be free from unnecessary risks that it will trigger foreign government retaliation against innocent American carriers or that it would place unfair or unequal burdens of risk of U.S. law enforcement upon American carriers.

Senator INOUYE. Mr. Hiltzheimer, if you will excuse me for a few minutes, I have to respond to a vote.

[Recess.]

Senator INOUYE. Mr. Hiltzheimer, please proceed, sir.

Mr. HILTZHEIMER. Sea-Land can support the basic concepts of tariff suspension and port closing as discretionary powers. As presently drafted, S. 2008 would not allow the FMC any discretion in dealing with carriers who fail to comply with discovery requirements. It mandates that the Commission shall suspend such carrier's tariffs and bar its vessels from U.S. ports. Although such actions have the virtues of simplicity, directness, and certainty, as well as being commercially effective, Sea-Land believes that it would be preferable to amend S. 2008 so as to substitute the word "may" for "shall." This would make the tariff suspension and port closing powers granted the FMC discretionary and allow them to deal with presently unforeseen variables. With such an amendment, the deterrent and enforcement power of the FMC would be effectively increased but the risk of international confrontation would be greatly diminished.

Senator INOUYE. If I may comment at this point, after listening to the Government witnesses, I'm inclined to agree with you that discretionary "may" may be better received by the State Department and Justice Department and the FMC also. So that will be very seriously considered.

Mr. HILTZHEIMER. Thank you.

I have already pointed out that many nations have laws prohibiting their carriers from producing information which would be proper subjects of discovery in U.S. proceedings. These differences between the United States and other nations must be reconciled, and this legislation, if amended to be discretionary, will be the catalyst to resolve the conflict. By giving some discretion to the Commision. it would add to that body's strength and lend impetus to overall U.S. efforts to press for elimination of the obstacles to foreign compliance with our laws.

Experience supports the prediction that the Department of State will most likely oppose any tariff suspension or port closing directed against a foreign carrier. Like experience supports a further prediction that no similar champion of U.S.-flag carriers can be expected to appear. Therefore, unless the Department of State abstains from such interference or the FMC resists such opposition, foreign carriers may be able to continue to hide behind foreign laws that can only be

effectively eliminated by intergovernmental negotiations as originally proposed by Sea-Land. Absent success in such negotiations, a commercial method of countering rebating will still be needed.

Sea-Land supports the provision that in the case of a person who fails to comply with discovery demands there is a rebuttable presumption that the facts alleged are proven for the purposes of the proceeding.

We believe that the carrier who willfully defines discovery efforts in factfinding or law enforcement investigations and the person who hides behind foreign secrecy laws, which often were enacted at carrier request, should have to pay a price. The presumption that the data refused would prove the violation charged is a reasonable measure.

Our attorneys advise me that because the person charged with the violation would be granted the right to produce evidence to rebut the presumption, the proposed statute is less harsh in result than rulings in civil cases where courts have reached presumptions against uncooperative litigants and denied them the right of rebuttal.

The second major aspect of S. 2008 is what has been referred to as the "amnesty" provisions but might better be called the "suspended fine" provisions. Some carriers will oppose or remain silent on amnesty out of fear that to do otherwise will be construed as an admission of wrongdoing. I am convinced, however, that every carrier, forwarder, shipper, and consignee, whether silent or vocally in opposition, really desires and would welcome adoption of the provisions for amnesty. Sea-Land strongly recommends their passage.

We are all aware, from public statements and testimony, that some 20 or more American and foreign carriers, and many more shippers or consignees, are currently under investigation in the FMC's rebating inquiries. Sea-Land supports the proposal of amnesty because we believe it will encourage an end to stonewalling and a beginning of broad cooperation and disclosure by both suppliers and users of transportation services. Only such cooperation and disclosure can permit the FMC to establish the informational base the Congress must have to fashion a long-term legislative approach to the industry's problems.

The chances that needed voluntary disclosures will be made to the FMC will be virtually nil if the disclosures can lead to risk of prosecution of the cooperating party by other arms of government. But S. 2008 would create just such risks. Section 3 of the bill would limit amnesty to those persons who make voluntary disclosures to the FMC "prior to the time such person has actual notice that it was the subject of an investigation relating to such act by any agency of the Federal Government."

There are certainly few carriers, and there are probably also few shippers, not already on notice that they are subjects of investigation by some arm of the Federal Government in regard to rebating allegations. Therefore none could receive the benefit of the proposed amnesty legislation and none would have any incentive to cooperate in those investigations or to come forward with disclosures that would further the purposes of the FMC and Congress.

Without such voluntary disclosures the FMC is not going to have anything of significance to include in the report which section 3 of the

bill would require be made to Congress 18 months after enactment of S. 2008.

If an effective amnesty provision is enacted into law, the FMC will receive the information it needs to form conclusions as to the culpabilities of other carriers and to assess civil penalties. The bill contemplates that such peralties will be compromised and reflected in settlement agreements between the FMC and the carriers. The result will be more civil penalty assessments and compromises after passage of the bill than are likely to be achieved if amnesty is not provided.

Mr. Chairman, I wish to return briefly to the theme of my earlier testimony before this committee. Mandatory independent action authority within conferences is a commercially viable answer to rebating, is entirely consistent with broadly accepted American business principles and provides a practical, simple, direct, certain, credible, and commercially effective deterrent.

Amendment of S. 2008 to make the tariff suspension and port closing provisions discretionary and to add independent action requirements would result in legislation admirably suited to this committee's purposes of establishing an effective interim program for both combating rebating and finding long-term solutions to the problems which plague the liner segment of the American merchant marine.

This Nation has spent billions of dollars to support a merchant marine that, despite the huge drain on the Treasury, has grown steadily smaller and weaker and has lost bigger and bigger shares of the liner cargo market to foreign competitors. I believe that the U.S. share of foreign trade today carried by the liner segment is about 15 percent if you subtract cargo preference.

The Merchant Marine Act of 1936 declared it to be the policy of the United States to foster the development and encourage the maintenance of a merchant marine sufficient to carry—a substantial portion of the waterborne export and import foreign commerce of the United States.

That is still the law, but there is little evidence that it is currently recognized or given effect by any Government agency other than the Maritime Administration. Certainly, the FMC's inability to enforce the 1916 act equally against foreign carriers defeats the purpose of the statutory policy of the 1936 act.

To those of us who are striving to provide the American capital and management skills which can produce and sustain a liner fleet that satisfies that declared policy, it seems that agencies such as Agriculture, AID, State, Justice, and sometimes even the FMC are counterproductive. Our foreign competitors and their governments deride the United States as naively out of touch with the realities of world liner trade and lacking a truly coordinated Government policy supportive of our merchant marine.

America must either have a coordinated and single-minded governmental policy of support for the U.S. merchant marine, or America must be prepared to publicly abandon the concept of maintaining a merchant marine capable of preserving our Nation's economic security or of meeting defense transportation needs.

On March 18 the then chairman of the FMC, the agency charged with regulation of common carriers in that waterborne foreign com-

merce of which the statutory policy of the United States says we ought carry a substantial portion, had to acknowledge to this committee that "the jurisdiction of the Commission under present law requires us to treat foreign carriers in the same way as U.S.-flag carriers." Yet, tragically, he also had to report that the Commission does not have sufficient statutory power to apply the enforcement aspects of the law equally upon foreign carriers.

Mr. Chairman, we need S. 2008 with independent action and other amendments suggested today by Sea-Land. More importantly, we need a new congressional mandate and a White House commitment to support of a modern and efficient U.S. merchant marine that has not only the hardware but the operational environment that will allow balanced and evenhanded competition to reestablish and preserve our flag's preeminence in this country's foreign commerce.

We at Sea-Land look to Congress to force a much-needed reappraisal of the Government's role in the future of our Nation's merchant marine. We look to these hearings as a spark. We hope that the spark will produce sufficient light and heat so that all agencies of Government will be directed by Congress and the President to set aside their differences and forge a coordinated and single-voiced governmental policy which recognizes and supports the importance of our merchant marine.

There must be an end to single agencies, pursuing their parochial goals, undermining this Nation's economic and military security by chipping away at the U.S.-flag shipping industry. America deserves a clear establishment of a coordinated and consistent maritime policy enforced evenhandedly and effectively by an independent FMC supported by all arms of Government acting in unison.

I thank you again for this further opportunity to present Sea-Land's views.

Senator INOUYE. Thank you very much, Mr. Hiltzheimer.

What would be the so-called real world effect if authority for independent action in price and terms were made available in this bill? I presume you would take advantage of that.

Mr. HILTZHEIMER. Well, as I stated in my earlier testimony before this committee, where we have had actual experience in one area with the right of independent action, I believe in some 3 years, we have only had to take independent action once. We view it, if it's properly constructed, as a way to maintain the conference but also to act independently where there is sufficient justification to meet a competitive rate. We do not see it as many other carriers view it, as a destructive thing, because as we stated earlier, if Sea-Land finds itself in a position where we feel we cannot compete legally with rebaters or other carriers who are raiding market shares, we seek remedies through the conference and if the conference is nonresponsive, we have only one choice, and that is to resign from the conference in which case the conference would likely dissolve.

So we see the independent action as a deterrent once you have it and it was used with discretion, with proper consultation and waiting time to convince carriers and persuade them. It would be, I think, a commercially feasible remedy to price cutting.

Senator INOUYE. Prior to drafting this measure I advised my staff to confer with several attorneys well versed in admiralty laws to make

certain that whatever bill is introduced will have a provision that would not in any way abrogate or affect the agreement that you entered into with FMC.

Now I wish to have your view or your counsel's view as to whether this bill does in fact carry out this intent.

Mr. RAGAN. It carries out that intent.

Mr. HILTZHEIMER. Yes, sir. If I may comment on that, it has been suggested by some that Sea-Land will utilize the amnesty provisions of the bill to obtain a waiver of future installments of the $4 million civil penalty which we agreed to on January 5, 1977. The FMC settlement agreement is a binding contract, and neither our rights and obligations nor those of the Government will be abrogated by passage of this bill.

Throughout our discussions with the FMC we have made it clear that if there's not effective enforcement activity leading to civil penalty, compromise and settlement with, or enforcement prosecutions against other carriers who are accused of rebating, Sea-Land will petition for relief from the terms of our settlement.

We already have the right to petition under the settlement agreement. The best way to reduce the likelihood of our seeking relief on the grounds of failure of the FMC to proceed against other carriers is to enact amnesty legislation. We believe that there has been an unfortunate inability of the FMC to take vigorous and effective and evenhanded enforcement action against carriers other than Sea-Land. We do not desire to be the only carrier required to function under the burdens of the settlement agreement such as the one which we voluntarily signed.

Therefore, it is very likely that we will petition for relief if there is not effective and evenhanded enforcement of the 1916 act against other carriers in significant numbers.

Since the secret nature of rebating makes meaningful enforcement of the law unlikely in the absence of voluntary disclosures, failure to enact an effective amnesty statute which will encourage such disclosures will probably set the stage for a Sea-Land petition for relief.

As the anniversary date of the settlement agreement approaches, we will evaluate our position in light of the circumstances that exist.

Mr. RAGAN. There's nothing in this legislation in any way that abrogates the agreement, Senator.

Senator INOUYE. Now, you have the right to petition with or without this measure?

Mr. HILTZHEIMER. Absolutely.

Senator INOUYE. Now, does this bill force the FMC to in any grant you the relief requested in the petition?

Mr. RAGAN. No; it does not.

Senator INOUYE. Under the present situation, can the FMC refuse the relief requested in your petition?

Mr. RAGAN. Yes.

Senator INOUYE. And this right of the FMC is not affected by this?

Mr. RAGAN. In no way.

Senator INOUYE. Now, it was suggested by one of the witnesses—I can't recall whether it was Justice or State—that the action you took in disclosing your malpractice involvements were not altogether voluntary. What are the facts there?

Mr. RAGAN. The facts on that, Senator, we will, with your permission, submit a chronological statement which will show that that statement was in error.

It was voluntary. It was after a great deal of effort. Our first meeting was with the FMC, not with the SEC. We were not laboring under a cloud. There was a grand jury in New Jersey looking into matters that did not relate to the rebate situation with which we were involved. We were not related to that grand jury. We voluntarily discovered our own problems, made our own disclosures, sat with the FMC then chairman and his staff, told him it would take another 6 months to develop all of the material possible before we could put it in, but we wanted them to be aware of it. This was done, and then subsequently, in June, I believe it was June—and I will correct this in the record—we did have to file a 10–K or an 8–K with the SEC which indicated some payments were made, but it did not go into detail.

So the statement was not correct.

Senator INOUYE. If you will submit for our record a chronology as I indicated, it would be most helpful because, as you indicated earlier, my intentions are sincere in having some sort of legislation not only considered but passed by the Congress, and I would hate to have this measure undergo opposition based upon newspaper articles and rumors suggesting that this a "Sea-Land" bill.

Mr. RAGAN. Irresponsibility of the newspapers has already been illustrated, and we will give you the chronology on it. Whether or not they will use it is up to them.

[The following information was subsequently received for the record:]

CHRONOLOGY OF EVENTS LEADING UP TO SEA-LAND SETTLEMENT

January 19,1976.—R. J. Reynolds-Sea-Land Service after months of investigation contact outside counsel to advise that its Internal Audit staff has uncovered preliminary evidence of questionable payments made in various locations and request for legal review of this preliminary evidence.

January 22, 1976.—Outside counsel submits preliminary advice on Shipping Act ramifications of questionable payments, which includes discussion of "compromise authority" of the Federal Maritime Commission under Public Law 92–416, including difference in approach between FMC and Justice Department, counsel also conferred with FMC counsel about "compromise authority."

February 11, 1976.—Outside counsel submits advice of Counsel to R. J. Reynolds-Sea-Land Service on Shipping Act ramifications of questionable payments which includes discussion of compromise authority of FMC under P.L. 92–416 and Justice Department disposition of similar situations with other carriers.

February 11–March 16, 1976.—Extensive discussion between attorneys and client on "Opinion of Counsel" and FMC procedures under compromise authority.

February 27, 1976.—Representatives of the U.S. Attorney advised by telephone Sea-Land attorneys that allegations had been made against Sea-Land in the course of an investigation of the National Maritime Union. (Sea-Land does not employ the NMU on its vessels.) The U.S. Attorney's office would not tell the Sea-Land attorney what allegations had been made and was not available for a meeting until March 31st. There was no discussion of rebates.

March 16, 18, 1976.—Extensive conferences and meetings between client and attorneys, reviewing FMC procedures under P.L. 92–416 and given authorization to proceed with settlement negotiations with tthe Federal Maritime Commission.

March 31, 1976.—Meeting between Sea-Land legal officers and representatives of the U.S. Attorney of Newark, New Jersey and the Internal Revenue Service, at which time the Sea-Land attorney was first advised that the investigation would be started and directed toward rebating in shipping.

April 7, 1976.—Meeting at FMC between counsel for Sea-Land Service and the Chairman, Executive Director, General Counsel, and Confidential Assistant to the Chairman.

April 15, 1976.—Letter from William F. Ragan, counsel for Sea-Land Service to Chairman Karl E. Bakke, Federal Maritime Commission.

"It is the purpose of this letter to advise you on behalf of our client, Sea-Land Service, Inc., that Sea-Land is now prepared to meet with you and/or your staff in connection with possible violations of Section 18 of the Shipping Act of 1916.

The purpose of our meeting would be to seek a compromise and settlement under the existing provisions and underlying regulations of Public Law 92–416."

April 21, 1976.—Meeting between counsel for Sea-Land and General Counsel for FMC to discuss the procedures for the disclosure and penalty compromise under P.L. 92–416.

April 27, 1976.—Discussion between counsel for Sea-Land and General Counsel, FMC for procedures for confidential treatment of materials disclosed to FMC.

May 17, 1976.—Conference between counsel for Sea-Land and Chairman, FMC in connection with status of disclosure matters by the Commission.

May 18–August 19, 1976.—Series of eleven submissions of audit data to the FMC by Sea-Land Service through counsel.

May 24, 1976.—Conference between counsel for Sea-Land and Chairman, FMC on documents to be filed with the FMC.

May 26, 1976.—Meeting at S.E.C. between counsel for R. J. Reynolds and Sea-Land Service and S.E.C. officials to discuss disclosure of payments made by R. J. Reynolds-Sea-Land Service.

May 28, 1976.—Filing of S.E.C. Form 8–K by R. J. Reynolds Industries, parent company of Sea-Land Service, concerning investigation into foreign payment problems by Sea-Land and various other subsidiaries of R. J. Reynolds.

June 4, 1976.—Meeting at U.S. Attorney's office in Newark, New Jersey discussing audit reports and advised that U.S. Attorney would subpoena records.

June 16, 1976.—Subpoena issued by U.S. Attorney of Newark, New Jersey, for all records collected during internal investigation, with a return date of August 9, 1976. (Return date subsequently extended upon mutual agreement of both parties.)

July 8, 1976.—Meeting between Assistant U.S. Attorney, Newark, New Jersey and counsel for Sea-Land Service to discuss the audit files and subpoena issued by U.S. Attorney for such files.

August 16–27, 1976.—FMC Enforcement Staff reviewed files and checked the findings of the independent accounting firm retained by the Audit Committee of R. J. Reynolds to conduct the investigation.

August 31, 1976.—Meeting between counsel for Sea-Land and I.R.S. investigators to assist in review of audit files.

September 2, 1976.—Meeting between counsel for Sea-Land and I.R.S. investigators to assist in review of audit files.

September 10, 1976.—Filing of S.E.C. Form 8–K by R. J. Reynolds Industries, parent company of Sea-Land Service, making the final report on the audit conducted of Sea-Land and other subsidiaries.

September 14, 1976.—Series of transmittals over period of time of audit documents to U.S. Attorney, Newark, New Jersey by counsel for Sea-Land pursuant to subpoena.

September 24, 1976.—Meeting between officials of U.S. Attorney's office, Newark, New Jersey and counsel for Sea-Land to discuss investigation of Sea-Land alleged malpractices.

September 29, 1976.—Letter from the Federal Maritime Commission sent to Sea-Land Service announcing the imposition of a penalty of $4 million on Sea-Land.

October 7, 1976.—Meeting between officials of U.S. Attorney's office, Newark, New Jersey and counsel for Sea-Land to discuss investigation of Sea-Land alleged malpractices.

October 28, 1976.—Meeting between counsel for Sea-Land and I.C.C. investigators to assist I.C.C. in procedure for review of audit files.

January 5, 1977.—Settlement Agreement signed by Federal Maritime Commission and Sea-Land Service, Inc. whereby Sea-Land agrees to pay a $4 million penalty for violations of the Shipping Act, take all reasonable steps to terminate the practices which are the subject of this claim and take all reasonable steps to preclude their re-occurrence in the future, maintain all records assembled

during the internal investigation and allow FMC investigators access to those records, and submit semi-annual compliance reports to the Commission.

Senator INOUYE. As a major participant in in the merchant marine of the United States, are you satisfied that the various agencies—Justice, State, FMC—have a cohesive policy in carrying out the mandate set forth in the law relating to sustaining a significant merchant marine?

Mr. HILTZHEIMER. Mr. Chairman, on behalf of Sea-Land, we certainly are not satisfied that there is any kind of unity among these agencies you mentioned. On the contrary, we believe that there's sufficient evidence to indicate that over the years there has existed a more or less individual agency interpretation and application as they saw it, sometimes detrimental to the U.S. merchant marine.

Senator INOUYE. Now all witnesses strongly suggested that this measure would result in retaliation by foreign powers. What is your response to that, sir?

Mr. HILTZHEIMER. Well, it's perhaps a difficult thing to predict. I think that depending upon how strong the measure we might take, there is certainly that risk. I also believe that our major trading partners—and I'm speaking of our Western allies such as Japan, West Germany, France, the United Kingdom, and some others—are anxious to resolve some of these problems. I'm not suggesting that they would do away with existing laws which protect their national lines from disclosure and discovery. I don't suggest that. But I do believe that because they are so heavily involved in the U.S. foreign commerce and most of them benefit by it, that they are anxious, I believe, to see some kind of meaningful, realistic policy come out of the United States, one which can be understood and one which is reasonably fair and equitable to everyone.

Now it's our view—and I think the record will show—that foreign carriers who operate in U.S. foreign commerce today enjoy many benefits denied U.S. carriers and that represents the key to the problem, which is that we have an environment which is not proper for the American carrier. We are operating at a distinct disadvantage. We are denied the consortia economy of scale. We are definitely under the reach of the U.S. law where the foreigner can violate the law and sometimes not be touched by it.

So what we need is to determine a policy that will create an environment in which the U.S. carrier, if he operates his business properly, is at least equally treated to the foreigner in his own trade; and while that sounds very simple, that has not existed for many years in the U.S. trade.

Senator INOUYE. You suggested that we should include as one of the steps intergovernmental consultation, discussion and negotiation. Now the State Department representative indicated that they have been involved in intergovernmental consultation, discussion and negotiations.

Are you satisfied that these intergovernmental meetings have borne fruit?

Mr. HILTZHEIMER. Mr. Chairman, I'm certainly not satisfied with the results. I do know that foreign carrier owners tell me that they are in direct contact with their governments advising them on what mari-

time policy should be, working very closely with agencies of their government.

I do not see that taking place in the United States today. I think there is a great need for that. I think my observation has been that the State Department and perhaps others who have had negotiations with foreign nations that involved our mechant marine have not been properly informed and in some cases have made agreements which were detrimental to the U.S. merchant marine.

Senator INOUYE. Well, Mr. Hiltzheimer, you have been most helpful. This is the second time you have been before this committee. We appreciate it very much. I have many other questions I would like to ask but most of them are very technical in nature and would require some very technical responses. So if I may, I would like to submit them to you for your consideration.[7] The hour is late. I note now that it is a quarter to 12. The time has come for this committee to adjourn.

My thanks to all of you. The session is adjourned.

[Whereupon, at 11:45 a.m., the hearing was recessed, to be reconvened at 10 a.m., Thursday, October 13, 1977.]

[7] See p. 157.

SHIPPING ACT AMENDMENTS OF 1977

THURSDAY, OCTOBER 13, 1977

U.S. SENATE,
SUBCOMMITTEE ON MERCHANT MARINE AND TOURISM,
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION,
Washington, D.C.

The subcommittee met at 10:20 a.m., in room 5110, Dirksen Senate Office Building, Hon. Daniel K. Inouye (chairman of the subcommittee) presiding.

OPENING STATEMENT BY SENATOR INOUYE

Senator INOUYE. Today the committee concludes its hearings on S. 2008, a bill to provide for a 3-year period in which to reach permanent solution of the rebating practices in the U.S. foreign trades.

The committee's consideration what many, including myself, believe to be a very serious threat to the American merchant shipping began with 2 days of hearings last March, and concludes with the hearings of yesterday and today.

At the end of its deliberations, the committee will have heard testimony from all Government agencies whose responsibilities are in some way concerned with rebating and its effect on our national shipping policy.

The committee will have also heard from numerous representatives of the United States and foreign-flag carriers, as well as others expert on the problem of rebating in our ocean trades.

It is apparent that as a government we have failed to solve the problem, and rebating is rife throughout our liner trades.

One of the major causes for the present situation is that our existing laws are simply inadequate to enable our agencies of Government to regulate effectively the foreign-flag carriers which transport the vast majority of the export-import commerce in our ocean liner trades.

In some instances, our trading partner countries have laws which forbid their flag carriers from producing documents and otherwise complying with the enforcement efforts of our responsible Federal agencies.

Because the vast majority of malpractices in these trades are beyond the pale of our enforcement authority, what action is taken is usually taken against our own flag carriers. This, of course, further exacerbates the situation because regulation and enforcement is uneven and discriminatory to the detriment of our merchant fleet.

In order to complete the hearing record, the committee invited testimony from Zim-American Israeli Shipping Co., Inc., and Nippon

Yusen Kaisha, Ltd., (NYK), two foreign-flag carriers, who participate in our liner trades.

In its invitation the committee stressed that it was only seeking information on the laws of Israel and Japan which would prohibit the production of documents located in those countries, in response to a subpena duces tecum issued by the FMC or the Department of Justice in a rebate investigation or prosecution.

Mr. Avner Manor, president of Zim-Israel, through counsel, informed the committee that although he was not refusing to testify, he would prefer to submit a statement from the Israeli counsel for Zim-Israel, addressed to the relevant provisions of Israeli law and the effects of S. 2008.[1]

Mr. Takashi Miura, general manager of Nippon Yusen Kisha, Ltd., has requested that this testimony be read by Mr. Jiro Murase, counsel, representing the shipping company.

The committee will respect the requests of both Zim-Israel and Nippon Yusen Kaisha, Ltd.

Upon completion of this morning's hearing, the record will remain open for 1 week. After thorough consideration of the comments and recommendations in the record, I expect the committee will report appropriate legislation to provide a mechanism for Congress with the assistance of of the FMC and other responsible Federal agencies to determine how ultimately to solve the rebating problem.

This morning we are especially pleased and honored to have with us a very illustrious citizen, illustrious because he had his beginnings with this committee. He used to be the counsel for this subcommittee.

With great delight, I welcome you back to the committee room, the Honorable Richard J. Daschbach, Chairman of the FMC.

STATEMENT OF HON. RICHARD J. DASCHBACH, CHAIRMAN, FEDERAL MARITIME COMMISSION; ACCOMPANIED BY ARTHUR PANKOPF, MANAGING DIRECTOR; JOSEPH INGOLIA, GENERAL COUNSEL; JAMES COOPER, DIRECTOR OF BUREAU OF ENFORCEMENT; AND CHARLES HASLUP, LEGISLATIVE COUNSEL

Mr. DASCHBACH. It is an honor and pleasure to appear before this committee in my first congressional appearance as Chairman of the FMC, to testify on S. 2008, a bill which is directed at solving the problem of rebating in our foreign ocean commerce.

I am accompanied this morning by a gentleman who I think you recognize, Arthur Pankopf, the Managing Director of the Commission; and also Joseph Ingolia, our new General Counsel; James Cooper, Director of the Commission's Bureau of Enforcement; and Charles Haslup, a legislative counsel of the Commission.

Upon my designation as Chairman by President Carter, I requested the Commission staff to analyze S. 2008 and prepare some preliminary comments on the bill for my review. Since then, we have thoroughly studied it and recognize both its postive aspects as well as some potential problems that might arise if it were to be enacted as now drafted.

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[1] See p. 135.

Moreover, we have also discussed alternative approaches to addressing the rebating problem which are set forth in this statement.

I would like to point out that I am testifying on this legislation today without the benefit of the analysis and advice of the Commission's new Managing Director and new General Counsel. The former, Mr. Arthur Pankopf, joined the Commission Monday; and the latter, Mr. Ingolia, came on board just yesterday. Thus, I would like to have the opportunity to revise or supplement this testimony at a later time.

Before discussing the specific provisions of S. 2008 and how they would affect the Commission's current statutory authorities, I want to report to you where we stand with respect to our existing enforcement program to eradicate, or at least reduce, illegal rebating. In May of 1976, the Commission reestablished a Bureau of Enforcement. Its mandate is to conduct an aggressive investigative program with respect to rebates and other malpractices. As you know, last year officials of Sea-Land Service, Inc., the largest U.S.-flag carrier in our liner trades, made a disclosure to the Commission concerning malpractices in its ocean cargo services. This disclosure resulted in the assessment of a $4 million civil penalty settlement, the largest in Federal regulatory history. The greatest benefit derived from the Sea-Land disclosure, however, is that the Commission gained some hard evidence indicating a pervasive pattern of rebating worldwide. Instead of pursuing allegations based on innuendo and undocumented reports, the Commission began to develop some reliable data on which to proceed.

Since August 1976, we have initiated investigation of 27 ocean carriers, based upon solid information indicating the payment of rebates and other concessions. Of these 27 ocean carriers, 9 are American companies and 18 are foreign companies.

Also, since last August, we have undertaken investigations of some 215 shippers or consignees known or believed to have received rebates or other monetary concessions from carriers in our liner trades.

In conjunction with these investigations, the Commission has initiated a program under which these companies are invited to make voluntary disclosure of all rebates or other monetary concessions, direct or indirect, from any ocean carrier in our trades. So far, a total of 69 shippers and consignees have indicated they will make such disclosures, and either have done so or are in the process of making them. All of these cases will be handled under the Commission's existing authority to assess civil penalties.

The persistence of rebating in our oceanborne foreign commerce and the scale of violations we have recently uncovered make it abundantly clear that current law is in need of amendment. The complexity of the problem demands innovation and imagination.

In discussing statutory amendments, let me first state my conviction that any modifications the Congress approves must place the same responsibilities on foreign flag lines as on American-flag carriers. It must be made clear to all that participation in our ocean commerce, the richest in the world, is a privilege, not a right. Full cooperation by all liner carriers is, therefore, an end which should be reflected in any statutory modifications which are to be considered by the Congress. We have a duty to regulate our commerce in the best interests

of the Nation, however that may diverge from the laws of other nations. I believe the thrust of S. 2008 is in this direction.

S. 2008 logically can be divided into three major subject areas. First, the bill would revise the existing procedures and authority under section 22 of the Shipping Act, 1916, for complaints related to rebating and certain other malpractices. Second, severe penalties are prescribed for failure of a respondent in a rebate proceeding to comply with discovery or subpenas. Third, the bill would grant amnesty for rebating that occurred prior to enactment of the legislation, removing both the civil penalties under the Shipping Act and criminal exposure under any other statute. I will address each of these areas separately.

REVISION OF ADMINISTRATIVE PROCEDURES RELATING TO REBATING

Section 22 of the Shipping Act currently provides any person the right to file a complaint with the Commission alleging a violation of the act and to seek reparation for the injury caused thereby. A proceeding instituted by the filing of the complaint is thereafter governed by the terms of the Administrative Procedure Act and by the Commission's Rules of Practice and Procedure.

S. 2008 would remove from this first part of section 22, any complaints which allege rebating violations. Incidentally, while we interpret the intent of the bill to be directed at, and limited to, rebating, we point out that a complaint filed under section 16's initial paragraph, 16 second, or 18(b), as provided in S. 2008, may cover other subjects unrelated to rebating. Therefore, we suggest that the bill needs to be clarified in this area.

Complaints relating to rebating would be handled under a new section 22(c) and would require analysis and some affirmative action by the Commission before proceeding could commence thereon. Not only would a complainant have no right to seek reparation under this procedure, but the Commission could deny him a forum for his complaint, without hearing, within 30 days if the Commission deemed the complaint insubstantial.

These results, we believe, are undersirable, and may well violate a complainant's right to due process of law. At the very least, this provision could result in court litigation the first time the Commission found such a complaint to be insubstantial. Thirty days is an insufficient amount of time to render an informed decision on such a question, and the bill envisions no procedure for allowing a complainant to be heard prior to such a decision. Moreover, the right of a complainant to seek reparation for rebating violations is one more deterrent to such insidious activity. For all of these reasons we strongly urge that the existing rights of a complainant be retained under section 22.

The procedures outlined in the bill would require that, in any proceeding involving an issue of rebating, a decision be rendered by the Commission within 180 days. In the alternative, the Commission could issue an interim order, stating in full why it could not issue a final order establishing the period within which it would issue a final order.

While I am in favor of shortening the time now consumed in completing adjudicative proceedings, and do not oppose the imposition of specific deadlines to accomplish this purpose, the deadline specified here may be unnecessary and potentially too restrictive. I say unnecessarily, because during the past 10 years there has been only one adjudicative proceeding involving rebates before the Commission. The primary reason for this is that the most rebating violations, like other violations of the Shipping Act involving civil penalties are best handled informally by the Commission's investigative staff. In instances when the Commission receives some initial information to trigger an investigation, this procedure generally produces evidence to follow up was an enforcement claim, and ultimately assessment of the civil penalty by the Commission or enforcement of the claim in Federal district court. When successfully pursued, this procedure is expeditious, and we intend to continue to utilize it whenever possible, as was the case in the Sea-Land and recent Sony settlements. Since 1971, this procedure has been utilized over 100 times for all types of Shipping Act violations, and has resulted in the collection of approximately $5 million in penalties.

The second method which the Commission is utilizing for pursuing rebating violations, is its factfinding investigation No. 9. This is a nonadjudiatory investigation conducted by a factfinding officer, under delegated authority from the Commission. In this instance the designated officer is Mr. Cooper, who is sitting at my right, who has the authority to issue subpenas when necessary to obtain information. As I have previously indicated, this investigation has produced evidence concerning 27 carriers and some 215 shippers and consignees. If our mission to pursue past violations remains unchanged, we anticipate that most or all of this evidence will be used in bringing enforcement claims against the offending parties.

Since this agency cannot assess penalties on its own at present, a formal hearing before the agency into rebating allegations can achieve little more than a general finding of a violation of certain sections of the Shipping Act. In order to impose penalties for such violations, the Commission must follow the same enforcement claim procedure described above. Thus, where the evidence can be obtained by our investigative staff, substantial time and effort can be saved. In the few instances where formal adjudicatory proceedings involving rebating have been conducted, they have involved extensive discovery and multiple parties. The most recent one, involving malpractices in the Brazilian trade, took over 3 years to complete. Quite frankly, there is little likelihood that any adjudicatory proceeding could be completed within 180 days, as provided in the bill.

PENALTIES FOR FAILURE TO COMPLY WITH DISCOVERY

We fully support the concept of more severe penalties for rebating and for failure to comply with subpenas or discovery in rebating investigations, and suggest that the provisions set forth in S. 2008 be strengthened as follows.

First, the penalties prescribed are applicable only for failure to comply with discovery or subpenas. We would suggest that similar, severe penalties should be inserted into applicable sections of the Shipping Act for any person who is found to have given or received a rebate or aided in its accomplishment.

Second, the penalties are directed almost entirely at carriers. Severe monetary penalties are directed almost entirely at carriers. We suggest that similar, severe monetary penalties should be provided as a deterrent to shippers, consignees, or other persons who receive rebates.

Third, we question whether Congress intends that U.S.-flag carriers be denied entry to U.S. ports. Moreover, there is no mechanism prescribed in the bill for imposing this sanction, and certainly such action is beyond the enforcement mechanism of this FMC. While the imposition of this penalty against foreign-flag carriers may be appropriate in severe circumstances, we would suggest that tariff suspension, coupled with severe monetary penalties for operating without a tariff, should be one of the alternatives available against carriers who are found to have rebated, These alternative sanctions are discussed in greater detail in the next section of this testimony.

Fourth, as I discussed earlier, the adjudicatory proceeding is not often used for rebate investigations. The bill is unclear as to whether the new section 22(c) would encompass factfinding investigations, and thus bring the penalty provisions to bear on failure to comply with subpenas issued in connection therewith. This should be clarified so as to make the same penalties available for failure to comply with any subpena directed toward rebating violations.

Fifth, we would suggest that any penalty for, or presumption arising from, failure to comply with discover or subpenas be invoked only after the opportunity is given to the respondent to show cause why such a penalty or presumption is inappropriate. We believe this would prevent any sanction from being imposed for improper discovery and afford due process to the parties involved.

Finally, the immediate suspension of all of a carrier's tariffs would have ramifications far beyond the trade in which the rebating is found to have occurred. As an example, suspension of all of the tariffs of a carrier which happened to be the sole carrier in a trade far removed from the rebating activity would severely penalize the shipping public in that other trade. We therefore would recommend that the Commission have the flexibility to limit any tariff suspension to the trade in which the rebating has occurred.

AMNESTY

S. 2008 would exempt a person from all penalties under sections 16 initial paragraph, 16 second and 18(b) of the Shipping Act for any act which may violate those sections, if such act occurred before enactment of the bill and if, within 1 year after enactment, the person who committed such act made a good faith disclosure thereof to the Commission. Moreover, such disclosure would convey immunity from criminal prosecution under any other law, so long as such disclosures were made prior to the time such person had actual notice that it was the subject of an investigation relating to such act by any Federal agency.

While we can see both advantages and disadvantages to amnesty from Shipping Act penalties for a person who makes a full disclosure of his rebating activities to the Commission, we question whether it is appropriate for carriers or shippers to be able to obtain, by such disclosure, immunity from criminal prosecution under all other laws of the United States. For example, this could include immunity from prosecution under laws beyond this Commission's jurisdiction, such as those administered by the IRS, the SEC, and the Department of Justice. Thus, the penalties from which the rebating carrier or shipper would become exempt by this grant of immunity could be substantial, even though the agencies administering these other relevant statutes would have no control over whether immunity were granted.

The Commission believes that its current enforcement program is producing positive results. For the first time, we have some solid evidence, which is generating more evidence in the form of disclosures by those carriers and shippers who are confronted with the facts against them. In this manner, the early Sea-Land disclosures have produced a chain reaction. Carriers have named violative shippers and those shippers in turn have pointed the finger at other carriers. In view of these developments, the Commission is optimistic about the successes of its current program, and is not ready to concede that it is unable to police past rebating activity.

Should an amnesty provision be enacted into law, we would urge that it focus only on rebating activities, and not on the other categories of violations which may be encompassed by sections 16 and 18 of the Shipping Act, 1916. We further recommend that any such amnesty be conditioned upon full disclosure of all of the names of the persons receiving or paying the rebates in question.

ALTERNATIVE SUGGESTIONS

As I have indicated, many of the provisions of S. 2008 would inject considerable clout into the Commission's current enforcement program. In addition to the proposals set forth above, we have several suggestions to offer for the committee's consideration that we believe would increase the Commission effectiveness in combating rebating.

In the long run, if the Commission's enforcement program is to prove successful, both shippers and carriers must be confronted by two primary deterrents to rebating. The first is a vigorous and organized attack against rebating by the Commission to the full extent of its abilities and authorities. This includes active pursuit of shipper and carrier violations regardless of the liner trades involved and regardless of the nationality of the carrier or shipper. What I'm suggesting, of course, is that the Commission itself must accept the responsibility for promoting an awareness that rebating is no longer to be thought of as part of the business; that will no longer be overlooked; and that the statutes enacted to prevent it will be strictly enforced.

Second, directly coupled with this tactical approach is the requirement that the Commission be vested with the statutory authority to invoke far more severe economic penalties than now possible under the Shipping Act against parties found to be either giving or receiving rebates or aiding in their accomplishment. As with most other legal

infractions, until such time as violators realize that the risks outweigh the benefits, rebating will continue to exist. In order to convince the shipping public that rebating just isn't worth the effort, we recommend that the Congress give serious consideration to the following proposals for strengthening the Commission's penalty authority.

Under existing section 18(b)(3) of the Shipping Act, the maximum penalty for rebating is $1,000 per day for each day the violation continues. This penalty is monetarily insufficient and difficult to interpret in the context of rebating violations, which tend to be specific instances and not ongoing violations, such as operating without a tariff. And ultimately, the penalty can only be imposed by a court. The Commission does have the authority to compromise civil penalties under Public Law 92-416, but upon refusal of a party to settle a claim for an amount the Commission deems fair, the matter must be litigated in a Federal district court.

We believe that the Commission should have a more potent arsenal of sanctions available to cope with rebating violations and that, similar to certain other Government agencies, it should have the authority to impose those sanctions itself, without burdening the Federal courts. Accordingly, we would suggest the following:

First, the penalties for rebating violations should be modified so as to make the following penalties available to the Commission, either alternatively or in combination:

1. Suspension of a carrier's tariff or tariffs for a period not in excess of 12 months, in the trade in question or in all of the trades served by that carrier, depending upon the circumstances of each case;

2. Monetary civil penalties of up to $25,000 for each shipment on which a rebate was paid or received in violation of sections 16 initial paragraph, 16 second, and/or 18(b)(3).

Second. the penaltes under section 18(b)(1) for operating without a tariff subsequent to any suspension order issued in connection with rebating should be increased from the present $1,000 per day to a maximum of $50,000 per day.

Third, section 32 of the Shipping Act should be amended to give this Commission the authority to impose the penalties for violaiton of sections 16 and 18 as set forth above. This delegation of authority to an administrative agency has been accomplished in statutes administered by other Federal agencies, including the National Labor Relations Board and OSHA. In a recent decision, the Supreme Court upheld this delegation of penalty assessment power to OSHA stating:

> At least in cases in which "public rights" are being litigated, for example, cases in which the government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the seventh amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to a admiistrative forum with which the jury would be incompatible. (*Atlas Roofing Co. Inc.* v. *Occupational Safety and Health Review Commission, et al.*—U.S. —, 97 S. Ct. 1261, 51 L. Ed. 2d 464 (1977)).

Should such authority be granted to the Commission, we envision that it would be implemented in much the same fashion as rebating enforcement procedures are currently handled. The Commission would still have the authority to compromise the amount of the penalty. Failure to arrive at a compromise, however, would result in some form of expedited hearing before the Commission or its administrative law

judges instead of the now required court litigation. As with the OSHA statute, the Commission's final decision would be reviewable by the courts.

With respect to the discovery provisions of section 2(2) of S. 2008, an array of penalties similar to those I've described above for an ultimate finding of a rebating violation should be available to the Commission in the event of a failure to provide documents or comply with subpenas in a rebating investigation. Again, the particular penalty involved would be dependent on the seriousness of the noncompliance. I should point out that due process requires that before any penalty for noncompliance could attach in such cases, some form of proceeding, such as the show cause proceeding suggested earlier, would be necessary to provide a forum for arguing the merits and relevance of the information sought.

Finally, in this same connection, we believe that the enforcement powers of the Commission could be greatly enhanced if each foreign flag carrier seeking to engage in U.S. ocean commerce were required, as a condition precedent to its tariffs becoming effective, to establish a resident agent in this country who would be a citizen of the United States in control of original or duplicate original business records of the carrier. As this committee is well aware, many foreign nations have laws which prohibit their citizens from furnishing business records to the governments of other countries, including the United States. While these laws would apply to corporations as well as individuals, we are of the opinion that the existence of the records in this country under the control of U.S. citizens would make them accessible to the Commission regardless of the consequence to the foreign carrier in its own country. We would recommend that the penalty for failure to furnish such documents by either the carrier or its agent, whether sought by discovery, by subpena, or by an order pursuant to section 21 of the Shipping Act, be the same as suggested for a finding of rebating, described earlier in this statement. Upon enactment of such legislation, those foreign carriers already operating in our trades should be required to establish such a resident agent within a reasonable period of time.

In closing, Mr. Chairman, I want to stress to you my commitment to pursue our present enforcement program against rebating to the fullest extent possible. Admittedly, there's a long road to travel before we'll be able to say we have rebating under control, but I do think the Commission is headed in the right direction with Fact Finding Investigation No. 9. As conditions and newly developed information warrant, we will undertake additional investigations and settlement procedures. Our focus will be on the activities of shippers, consignees, and carriers, whether those carriers operate as independents or as conference members. With respect to conference members, I do want to emphasize that I intend that the Commission monitor the self-policing activities of the liner conferences with great diligence. In this area, the Commission has recently redrafted its rules on conference self-policing, and inasmuch as Mr. Ingolia and Mr. Pankopf have just joined the Commission, I have withheld a decision on releasing these rules until they have had an opportunity to examine them. A

program for closely monitoring the self-policing reports filed by the conferences has also recently been instituted by the Commission.

If the Commission becomes convinced that a particular conference is merely paying lip service to its self-policing obligations under section 15 of the Shipping Act, we should not hesitate to initiate action to disapprove the outstanding agreement through which the conference is permitted to operate. Incredible as it may seem, since the Commission was created in 1961, it has never instituted a proceeding to disapprove an agreement based on a conference's failure to adequately police the obligations under its enabling agreement. This section 15 disapproval authority is one regulatory tool already available to the Commission that can and should be far more vigorously relied upon in our effort to curb illegal rebating within conferences.

The campaign against rebating is one of the most important challenges confronting the Commission today. At stake is not only the integrity of our tariffs, but that of our entire regulatory and statutory scheme. You may be sure that the Commission will attack the problem not only by seeking changes in the law, as we do here today, but also through investigation and our rulemaking and report-gathering authority.

In stressing my intention to proceed with an active enforcement program, I do not mean to completely close the door on the concept of amnesty for past rebating violations. As I mentioned earlier, however, I think the new management personnel at the Commission and I need to do considerable thinking on the subject before the Commission commits itself to a final position. It may well be that the Congress will determine it to be in the national interest to put all past violations behind us and start afresh. If that's the case, we'll put full effort into monitoring the trade and pursuing any new reports of violations with, I hope, the new authority I've suggested above. If, on the other hand, it is found that the key to future success rests within the informational sources of ongoing investigations, we will continue to pursue them with equal resolution.

Once again, I thank you for the opportunity to appear before you today. I look forward to working closely with you and the committee in the future as we attempt to make the Commission and the statutes it administers more relevant to current times and conditions. There is much to be accomplished, and I'm looking forward to the many challenges that I've been presented.

The Commission staff and I are prepared to work closely with the committee staff on S. 2008 in resolving any matters that may still be pending upon the completion of these hearings. This concludes my statement, Mr. Chairman. I'll be happy to answer any questions you may have.

Senator INOUYE. Thank you very much. I appreciate your statement.

It is a bit different from the statements I have heard from other agencies. You have not used the word retaliation once.

Are you concerned that this type of measure would result in retaliation from abroad?

I ask this because some of the proposals that you have suggested are a bit more painful than the ones that we have suggested.

Mr. DASCHBACH. I read the testimony given yesterday by officials of the other departments and the scenarios suggested that if we would

prohibit carriers of a certain nation from entering our ports, those nations would retaliate against us leaving the trade available to third-flag carriers.

It paints a serious picture. My concern, and yours in the past, involves other proposals in which the suggestion of retaliation was frequently thrown up to us. My visceral feeling about it is that we are the biggest guy in the neighborhod, and I wonder if retaliation would be used against us.

But I think it is serious. I don't think we should lightly dismiss it. I think the scenario—I can't recall whether it was the Treasury Department or the State Department testimony which drew out the whole picture—presented one of some concern.

Senator INOUYE. I am certain you are aware that this measure is just an interim measure. It does not provide any final solution, it doesn't intend to do so.

It intends to provide your Commission with some additional sanctions to enable it to carry out an extensive, in-depth study of this problem and come forth within 3 years with your suggested solution.

Mr. DASCHBACH. I hope we can reach that before 3 years.

Senator INOUYE. Now I am certain you are aware that this measure has been referred to in some quarters as the Sea-Land bill.

Does this bill as studied by you and your staff, provide any relief to Sea-Land from the agreement reached by that company with your Commission?

Mr. DASCHBACH. I would like to have the General Counsel respond to that.

Mr. INGOLIA. Senator, I wouldn't think the bill itself provides any relief for Sea-Land explicitly. It doesn't change their posture specifically in any way. But I think, depending on what is done in the amnesty area, it could affect it in the sense that they do have the right under the agreement to come back to the Commission and ask that the settlement be reconsidered, and I suppose we would have to take into consideration the views of the Congress with respect to amnesty. But of itself, I don't think the bill provides any relief to Sea-Land

Senator INOUYE. With or without this measure, they would have the right to petition.

Mr. INGOLIA. Yes, sir, they do.

That is why I say it doesn't affect that at all, and they can petition whether or not the Congress enacts this bill.

Senator INOUYE. And if you have studied the legislative history to date, I think the FMC, if it cited this measure as an excuse to modify, grant the petition, would be not following the intent of Congress, because we have made it eminently clear that we do not intend to have this bill serve as a vehicle to grant special relief to Sea-Land.

Mr. INGOLIA. Certainly it doesn't do that. And nothing in the bill would have that effect in any way, I don't believe.

Senator INOUYE. So from that standpoint you are satisfied?

Mr. INGOLIA. Yes, sir.

Senator INOUYE. Now, Mr. Daschbach, you spoke of the record of your Commission, $5 million in penalties since 1971, $4 million of that is Sea-Land's, isn't it?

Mr. DASCHBACH. Yes, sir.

Senator INOUYE. So $1 million is all the rest since 1971?

Mr. DASCHBACH. That's correct.

Senator INOUYE. Now, of the remaining $1 million, or approximately $1 million, were they all penalties paid by U.S. corporations or companies incorporated in the United States?

Mr. DASCHBACH. No, they were not.

Senator INOUYE. Can you tell us what foreign corporations paid penalties?

Mr. COOPER. Senator, I cannot tell you at this time, but we can provide that information for the record.

Senator INOUYE. Are there a lot of them?

Mr. COOPER. I know there have been some foreign steamship companies that have concluded civil penalty agreements with the Commission.

Senator INOUYE. Would you give us a list of that, please?

Mr. COOPER. Certainly.

[The following information was subsequently received for the record:]

FOREIGN COMPANIES CONCLUDED CIVIL PENALTY AGREEMENTS WITH THE FEDERAL MARITIME COMMISSION FROM 1971 THROUGH OCT. 13, 1977

Name	Settlement amount	Settlement date
Transition quarter fiscal year 1976:		
Tras-Mex	$7,000.00	7-19-76
Frota Amazonica	10,000.00	7-12-76
Fiscal year 1976:		
F. Paese S/A et al	500.00	1-29-76
Shipping Corp. of India	1,500.00	4-26-76
Peninsular & Oriental Steam Navigation Co.	3,000.00	5- 6-76
Okada Express	1,200.00	3- 9-76
Ivaran Lines	4,000.00	2-10-76
Kulukundis Maritime Ind. & Star Line Agency	197,000.00	1-26-76
Zim Israel Navigation Co., Ltd.	2,000.00	12-23-75
Hoegh-Ugland Auto Lines	10,000.00	12-30-75
New England Express	13,500.00	12-29-75
A. Bottacchi S/A de Navigacione	5,000.00	11-26-75
The Shipping Corp. of India Line	3,500.00	10-21-75
Sanko S/S Co., Ltd.	1,500.00	10-23-75
Buques Mercantes del Caribe	1,000.00	7-28-75
Fiscal year 1975:		
Canada Express Line	23,000.00	6-19-75
Sterling Navigation Co., Ltd.	16,000.00	4-25-75
Baltic Shipping Co.	4,500.00	4-14-75
Union S/S Co., of New Zealand	5,000.00	3-10-75
Sea-Land, Japan Line, KKK, Yamashita-Shinnohon S/S	5,000.00	3- 3-75
French Line	4,000.00	1-30-75
Leeward Island Shipping Co., Inc.	2,000.00	11- 5-74
(Navenal) Compania Nacional de Navegacion	3,500.00	1- 9-75
Roc International, Inc.	4,500.00	12-16-74
Compania Sud-Americana (Chilean Line)	2,000.00	8- 2-74
Kambara Kisen Co., Ltd.	1,500.00	7-23-74

FOREIGN COMPANIES CONCLUDED CIVIL PENALTY AGREEMENTS WITH THE FEDERAL MARITIME COMMISSION FROM 1971 THROUGH OCT. 13, 1977—Continued

Name	Settlement amount	Settlement date
Fiscal year 1974:		
Jugolinija Yugoslav Line	5,000.00	6-24-74
Flomerca	30,000.00	5-23-74
C.A. Naviera Orinoco	5,000.00	7-12-73
Sterling Naviagtion Co., Ltd.	12,000.00	8-20-73
Muhamadi Steamship Co., Ltd. (Crossocean)	4,500.00	8-29-73
Booth Steamship Co., Lamport & Holt Line, Linea Amazonica, S.A.	3,000.00	7-17-73
China Merchants	1,000.00	7-20-73
Fiscal year 1973:		
United Enterprises & Shipping (PTE) Ltd.	999.00	5-16-73
Hanseatic-Vaasa	8,000.00	12- 1-72
Pan American Main Line	9,500.00	6-21-73
Nippon International Container Services Ltd.	12,000.00	12-72
Horn-Linie	4,000.00	6-73
Far Eastern Steamship Co. (FESCO)	15,000.00	6-73
Toko Line	16,000.00	4-73
Belfranline, Ltd.	2,000.00	11-72
Atlantic Shipping Co. S.A.	2,500.00	9-72
Sanko Steamship Co., Ltd.	16,000.00	8-72
Agromar Line	4,000.00	7-72
Fiscal year 1972:		
National Shipping Corp of Pakistan	5,000.00	3-72
Netumar Line, E.L.M.A. et al	7,250.00	3-72
Naviera Lagos, S.A.	2,500.00	1-72
Tokai Shipping Co.	9,500.00	12-71
Toko Line	15,000.00	11-71
Tokai Shipping Co., Ltd.	10,200.00	11-71
Continental Lines	6,553.37	10-71
Do.	3,000.00	9-71
Fiscal year 1971:		
Federal Commerce & Navigation Co., Ltd.	5,000.00	6-71
Northern Pan-American Lines (Nopal)	1,000.00	5-71
Empress Lineas Maritimas Argentinas (Elma)	4,000.00	5-71
Bordas & Cia	2,000.00	7-71
Johnson Line	5,000.00	1-71
Cia Colonial de Navigacione	500.00	11-70
Continental Lines	6,250.00	10-70
Flota Mercante Gran Centro-Americana	30,313.88	10-70

Senator INOUYE. I gather from your statement, Mr. Daschbach, that you would be in favor of having a measure that would provide the solution, instead of going through the investigation, setting forth these standards and new penalties.

Am I reading you correctly?

Mr. DASCHBACH. That is right, Senator. I am convinced that stiffer penalties would certainly be valuable.

Senator INOUYE. Is it your suggestion that a study is not necessary?

Mr. DASCHBACH. No, I wouldn't say that our suggestions here definitely cover the whole, universal problem. I'm sure that something could be accomplished by going beyond interim steps to an ultimate resolution, or to seek an ultimate resolution.

Senator INOUYE. As suggested by you, I indicated yesterday that I am in favor of providing greater flexibility than that provided in this bill, to the Commission in meting out penalties and sanctions.

But, do you believe that this bill would prohibit you to enter into informal investigation and discussions with suspect companies?

Mr. DASCHBACH. No, but I think that some of the provisions with respect to rebating complaints become more regid. I believe with respect to our own initiatives we still have the same flexibility.

Senator INOUYE. It was not the intention of the author of this bill to provide relief to any one under any criminal statute.

I assure you that the intention was to provide some sort of relief under the amnesty provision for those actions arising from or having genesis in rebating procedure itself.

Do you think that is too broad?

Mr. DASCHBACH. We see both. There certainly are advantages to granting amnesty.

Senator INOUYE. Well, I will give you a specific example instead of hypothetical.

Shipping company *x* comes forward to the Commission and voluntarily announces that it wishes to disclose all of the facts involved in past rebating activities.

There is no action pending at the time, and as one of the witnesses indicated, no hot breath of the Government on their backs. Everything is clean. You have nothing going on, there is no pending investigation.

And in your investigation it is found that this company filed tax returns and listed in the tax returns as income from illegal payments, and paid taxes on that, should that company be charged with some conspiracy, criminal conspiracy to defraud the Government for noncompliance with the laws of the Government?

Mr. DASCHBACH. Senator, I don't mean to be uncooperative. I think, really, that answer is better answered by the Department of Justice.

Senator INOUYE. Oh. I thought you might give me some guidance.

Let's say that this company paid illegal rebates, but listed in its returns as a cost of doing business, $1 million paid to *x* company as illegal rebate payment.

Should that company be charged under the criminal statute?

Mr. INGOLIA. If I may answer that, Senator.

Senator INOUYE. Yes, sir.

Mr. INGOLIA. I don't think they would be, in the first situation charged under the criminal statutes with respect to, say, the IRS, because they have reported the income.

And the only—in that particular instance, the only area of concern would be the area of concern that involves the FMC. And whether or not there would be a conspiracy with respect to the matters that affect the FMC would depend on the facts relating to it.

Senator INOUYE. Well, now should the Justice Department now proceed against this discloser, payor?

Mr. INGOLIA. Well, the Justice Department has, in the past—for example, in some areas if a person made—if there was a voluntary disclosure—some time ago they had a policy in the voluntary disclosure area that they would not proceed criminally. A long time ago that was in being. It was a very brief period of time.

The Justice Department has, I think since the 1960's or 1961, decided that voluntary disclosures should not preclude criminal prosecution, for example, in the tax area. As I say, they had that policy for about 2 years, and they felt it wasn't aiding their criminal program. It was affecting the deterrent aspect of it. So they went ahead and prosecuted people even though they had made voluntary disclosures. And I think that is their policy generally.

Senator INOUYE. Mr. Daschbach, I have requested the other agencies to assist the committee by submitting suggested language to amend S. 2008.

They have indicated that they would be happy to do so.

I would hope you can do the same for us.

Mr. DASCHBACH. We certainly will, sir.

Senator INOUYE. Especially in the area of amnesty, if you want to call it suspended fees.

As indicated by you, one of the major sanctions involved does not affect shippers because you can't close a port to a shipper. You can easily close a port to a carrier, but I don't see how we can close a port to a shipper.

Can you suggest any way we can provide some similarly severe sanction against a shipper?

Mr. DASCHBACH. Well, none other than a more severe monetary penalty. At this point I think we really have to go back to our "think tank". I believe the point is, however, if all the carriers in a specific trade were operating cleanly, that would pretty much limit the shippers' opportunity to violate the rebating prohibition.

Senator INOUYE. In the investigation, and the question of rebating, what sort of relationship have you had with the State Department and the Justice Department?

Mr. DASCHBACH. In the 4 or 5 weeks that I have been at the Commission, I have gone the last mile—it has not been difficult, I want to say—in bulding a bridge between ourselves and the Office of Maritime Affairs of the Department of State. And frankly, I am very pleased with the developments that have occurred.

You and I both know the relationship in the past between State Department and the maritime community. I am very pleased to say that things have improved dramatically, and are improving daily.

With respect to the specific point of rebating, since I have been at the Commission, we have not had any specific contact with officials from the State Department, except in a very informal, preliminary discussion stage. But I anticipate that things will go smoothly with them.

Senator INOUYE. Do you believe that the shipping policy as set forth in the Shipping Act, the declaration of policy, is the law of the land?

Mr. DASCHBACH. Absolutely.

Senator INOUYE. Being the law of the land, you would think that it is a mandate to all of the departments of the United States, or should it be just the FMC?

More specifically, should the Justice Department and the State Department comply with the policy and the law of the land?

Mr. DASCHBACH. That would be my personal opinion, yes.

Senator INOUYE. Now, do you believe that these two agencies have been doing that?

Mr. DASCHBACH. I have had to become a very judicious and diplomatic person since I have changed chairs with John Hardy, counsel to your subcommittee, and——

Senator INOUYE. Let's be undiplomatic for a change.

Mr. DASCHBACH. Well, I can honestly say that I really have no quarrel—since I went to to the Commission in August—I have no complaints with the State Department.

And also, with respect to the Department of Justice, I really haven't faced them yet. So I can't give you any specific instances of problems that we have. It is just my personal feeling that the Antitrust Division of the Department of Justice does not like and is unwilling to accept the Shipping Act as the law of the land. It is just that simple.

Senator INOUYE. Do you think this has changed since August?

Mr. DASCHBACH. No; I can't say that it has changed. In fact, from the filing of the briefs in our dockets and speeches that have been made, I certainly don't see any change.

As you know, the Commission mandate is to assure equal and fair treatment to all carriers. So I have to be very judicious about what I say. But I was reading Mr. Hiltzheimer's statement this morning, and I think, that in order to be judicious and diplomatic, just for the exercise of my voice I will read what he said yesterday. I am not endorsing it, but I am not condemning it either:

America must either have a coordinated and single-minded governmental policy of support for the U.S. Merchant Marine, or America must be prepared to publicly abandon the concept of maintaining a merchant marine capable of preserving our Nation's economic security, or meeting defense transportation needs.

I think I will just stop at what I just said.

Senator INOUYE. Do you agree with that?

Mr. DASCHBACH. I won't get in any trouble by saying I agree with that.

Senator INOUYE. Now the State Department suggested that the proposal was a bit too harsh. And although they concurred with the intent of the committee and the authors of the bill, they felt that their method would be a bit more successful without ruffling feathers.

They cited their successes in intergovernmental discussions, conferences, and negotiations.

Are you satisfied that intergovernmental negotiations, conferences, and discussions have been successful in cleaning out rebating in the trades?

Mr. DASCHBACH. I can't say that I am aware of any evidence that they have. But with respect to the future and what they are suggesting, first they haven't—I assume they haven't—seen my testimony. So if they thought that the bill as drafted was harsh, I imagine they will feel that some of the suggestions that we have made, alternatives that we have suggested, are even more harsh.

I think, however, that if we are going to have intergovernmental discussions, if we have a stronger arsenal of tools in our statutes, we are all better off when we have those discussions.

I don't want to throw cold water on their suggestions for the future; in fact if and when there is a maritime matter to be discussed with a foreign nation, I think that is the responsibility of the State Depart-

ment and the FMC to both be there. I don't think that the FMC should go it alone and negotiate with a foreign government, nor do I think that the State Department should negotiate maritime matters with a foreign government without the presence and the counsel of the FMC.

But I think that if we have more stringent penalties, and more efficient procedures we can come up with a better trade when we sit down with foreign government officials.

Senator INOUYE. Do you think that the administration should call you in, as Chairman of the FMC, when negotiating with the Soviets in the opening of ports as they did? As you know, we opened 40 of our ports to the Soviets. They opened 40 of theirs, that we cannot use.

Mr. DASCHBACH. Well, on that issue, on those issues that were discussed at that time, it is my understanding that the officials of the Maritime Administration were there, and I certainly don't think that our side was underrepresented by the absence of the FMC and the presence of the Maritime Administration. I think it might have been valuable if the FMC presence had been there at the time for whatever input might have been beneficial at that moment.

Senator INOUYE. How do you propose to bring about this greater cohesiveness among the various agencies directly involved in the life and future of our merchant marine, to wit, State Department——

Mr. DASCHBACH. That is a problem that I wrestled with when I was sitting in John Hardy's chair. I think it has got to come from the highest authority in the administration.

It is clearly not the role of the FMC to coordinate maritime policy.

Senator INOUYE. What is the role of the FMC?

Mr. DASCHBACH. The role of the FMC is to assure equal conditions, treatment, practices to the shippers, carriers, and consignees in the foreign commerce of the United States. I can tell you that I am somewhat frustrated by the strictures of that mandate.

Senator INOUYE. If that equal treatment is not occurring, what should then be your stance?

Mr. DASCHBACH. Well one of them, of course, is to come up here and attempt to have the law modified.

The other is that there is authority under section 19 of the Merchant Marine Act of 1920 to attempt to equalize conditions which have been imposed on American—I believe—I'm not sure whether it is just the carriers.

That statutory authority provides that:

> The Commission, with authorization to make rules and regulations affecting shipping and foreign trade not in conflict with law, to adjust or meet conditions or special conditions unfavorable to shipping and foreign trade, whether in any particular trade or route and which arise out of or result from foreign laws, rules and regulations or from competitive methods or practices employed by owners, operators, et cetera, of vessels of a foreign country.

So, I think we have got authority in specific instances to take action to restore the balance.

Senator INOUYE. Now, I'm certain the Commission has been aware of the activities of several of our trading partners, who have passed laws, as noted in your testimony, to prohibit their nationals and citizens from cooperating with our Federal agencies in matters such as providing documents.

What has the Commission done in this area, other than make statements?

Mr. COOPER. The Commission has before it now, Senator, motions to quash subpenas that were issued to several foreign carriers.

The Commission, I assume, in the near future will rule on those motions. And then, in my opinion, it would be up to the carrier at that time to determine what their own course of action should be as the next step.

Senator INOUYE. Has the Commission worked with the State Department in this area?

Mr. DASCHBACH. I don't believe so in any of those cases. They haven't ripened to that point.

There was a case in 1963—this morning we were scurrying around looking for the record on this. The Commission attempted through the State Department and the Justice Department, or through Jusice to get State to help us obtain documents that were located abroad. And our negotiations and discussions continued to a point where the statute of limitations ran.

Senator INOUYE. Thatwas very convenient.

Do you have anything in your records to indicate that a subpena duces tecum issued by your agency has been honored by any foreign citizen on documents on foreign soil?

Mr. DASCHBACH. We are not aware of any. Mr. Cooper's response to me is that not in his tenure at the Commission as an investigative officer.

Senator INOUYE. That being the case the Commission itself has been involved in the same type of activity as Justice, to wit, picking on American companies and laying off foreign companies.

Mr. DASCHBACH. Well, I'm not sure that is fair to suggest. We have issued subpenas to foreign companies.

Senator INOUYE. And none of them have been honored, but all of the subpenas issued to American companies better be honored.

Mr. INGOLIA. Since I have been abroad, we have looked, in counsel's office, at that question, Senator, and you are right. There is just no question that while the Commission undertakes to treat foreign and American companies in the same manner by issuing subpenas duces tecum, the result in the foreign area is that we run into a great deal of difficulty because they simply aren't honored for various reasons and litigation ensues.

There is a case pending now in the ninth circuit, as you are aware, and there are at least 12 countries that have either enacted laws, or have policies that prevent its citizens from giving the information that we ask for.

And hopefully, I think that is what the chairman was referring to in our dealings with the State Department, that if the State Department is really interested in helping us, and as the chairman indicated I think they are, this is an area where they could be of great assistance to us in attempting to persuade those countries to suspend that type of policy or law so that we could treat the foreign companies the same as we do the American companies.

Senator INOUYE. So, for all intents and purposes, all of the ambitious laws we have in our books, to rid this trade of malpractices, applies only to American companies?

Mr. INGOLIA. Well, I don't think it applies only to American companies, but I think the end result is that our efforts——

Senator INOUYE. Well, it applies to everyone, but in reality the only one affected would be an American company.

Mr. INGOLIA. I don't think it is fair to say that the only one that ever is affected is an American company. But it certainly goes in that direction. Certainly in the foreign area there is a problem with respect to carrying out the Commission's mandate as opposed to an American company where we haven't the problem because they are right here and we can deal with them directly.

There is just no question that it would be helpful if the laws would allow us, or in some way through State or otherwise, we could undertake to treat the foreign companies the same way we do the American companies.

Senator INOUYE. Now, Mr. Daschbach, in your testimony you indicated that the present process in the Commission seems to be bearing fruit.

Is that because of the disclosure; some shippers are now pointing fingers at carriers, and the carriers in turn are pointing fingers at someone else?

Now where did this begin?

Who made the first disclosure?

Mr. DASCHBACH. Sea-Land.

Senator INOUYE. In other words, if you did not have someone coming forth voluntarily, not because of the hot breath of the law, this process you speak of would not be working?

Mr. DASCHBACH. I think that is fair to say.

Senator INOUYE. So you would agree that if we are to expect our industry members to come forth and make voluntary disclosures, some sort of amnesty is a realistic approach?

Or, would you think that companies would follow the example of Sea-Land and would now come forth waving the flag of the United States and say, I want to be a patriot and be willing to pay fines and be subject to grand jury proceedings?

Mr. DASCHBACH. I think there have been other years in which operators have come forth.

Senator INOUYE. Voluntarily?

Mr. DASCHBACH. Yes, in addition, I mention again the alternative which we have suggested, to wit, a resident agent in the United States and the right to suspend a carrier's tariff. To me, a most significant tool that we could have would be to withhold the carrier's ticket to enter the game.

Senator INOUYE. Now do you believe that foreign carriers would voluntarily bring in large crates of their documents from abroad to assist you?

Mr. DASCHBACH. Well, they haven't yet.

You mean under present law?

Senator INOUYE. Yes.

Mr. DASCHBACH. They haven't yet.

Senator INOUYE. Do you think that some might decide to do so if the amnesty provisions were part of the law?

Mr. DASCHBACH. It is certainly a possibility.

The question, of course, is how broad is the amnesty?

If you were to give amnesty for Shipping Act violations, and yet a carrier or shipper were still subject to criminal sanctions under other statues, I'm not so sure that for the forgiveness of the venial sin they would be willing to subject themselves to the penalty of a mortal sin.

Senator INOUYE. Well, don't you think that they might volunteer to come forth if they know that if they fail to honor a subpena, ports might be closed to them?

Mr. DASCHBACH. I think that would certainly make them think it through.

Senator INOUYE. How else can we get even treatment for Americans and foreigners?

Can you think of any other way?

Mr. DASCHBACH. Well, as I said, suspending the tariffs, and if they continue to operate in spite of the suspension of their tariff, you would have a $50,000-a-day fine. If you make it expensive enough—you know, it is a pretty simple fact to determine once your tariff is suspended.

Senator INOUYE. You are suggesting that if this company fails to honor a subpena, you suspend the tariff?

Mr. DASCHBACH. Yes, sir.

We have suggested just that in our testimony, after conducting a show-cause proceeding—to satisfy due process considerations—as to why their tariff should not be suspended for violating the statute requiring them to comply with the subpena. That is the ticket to be in the game, to have your tariffs on file with the Commission. No one can operate in the foreign commerce of the United States, as a common carrier.

Senator INOUYE. This is the first time the Commission has ever suggested anything like this, isn't it?

Mr. DASCHBACH. I think so.

Senator INOUYE. Well, I could go on like this for many, many hours, Mr. Daschbach, but we have many, many other witnesses. And as in the days of old, we have many questions.

And you have set the lifestyle here, so I would like to submit these questions to you.[1] Most of them are legally very technical. And if you can get together with counsel, and respond to them, we would be very appreciative, sir.

Mr. DASCHBACH. We will be happy to do that.

Senator INOUYE. Once again I appreciate your presence here, the first time before your old committee, and we thank you very much.

Mr. DASCHBACH. Thank you very much.

Senator INOUYE. I have been advised that Mr. Thomas Smith must be out of the city by noon, so our next witness will be chief executive officer of Farrell Lines, Inc., appearing as chairman of the Liner Council of the American Institute of Merchant Shipping, Mr. Thomas Smith.

Welcome to the committee, sir.

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[1] See p. 159.

STATEMENT OF THOMAS SMITH, PRESIDENT AND CHIEF EXECUTIVE OFFICER, FARRELL LINES, INC., APPEARING AS CHAIRMAN OF THE LINER COUNCIL OF THE AMERICAN INSTITUTE OF MERCHANT SHIPPING; ACCOMPANIED BY ODELL KOMINERS, ATTORNEY FOR AIMS; AND ALBERT E. MAY, VICE PRESIDENT

Mr. SMITH. Thank you very much.

Mr. Chairman, Senators, and committee counsel, my name is Thomas J. Smith. I am president of Farrell Lines, Inc., whose principal office is in New York City.

I am also a member of and am appearing today as spokesman for the Liner Council of the American Institute of Merchant Shipping—AIMS.

The AIMS Liner Council is an industry association consisting of nine American-flag lines involved in shipping services on all major U.S. trade routes.

Senator INOUYE. Would you care to introduce your colleagues before you proceed?

Mr. SMITH. I am accompanied by Mr. Odell Kominers of the law firm of Kominers & Fort, as an attorney for AIMS, my counsel in this instance, and Mr. Albert E. May, who is vice president of the American Institute of Merchant Shipping.

The Liner Council members strongly—I have quite a bit of statutory language in here, Mr. Senator, and if I could skip that part of it.

Senator INOUYE. Without objection, your full statement will be made a part of the record, sir.

Mr. SMITH. Thank you very much, sir.

The Liner Council members strongly support effective anti-rebating measures and commend the initiative of this committee in developing a bill containing comprehensive changes in the Shipping Act which are designed to eliminate illegal rebating of ocean freight charges in the foreign commerce of the United States.

The AIMS Liner Council wishes to propose certain amendments to the present wording of S. 2008 which it believes would strengthen the effectiveness of this legislation. These changes will be set forth in separate proposals, each dealing with specific aspects of the anti-rebating and enforcement problem. We believe these proposals are necessary and practical.

In the matter of the amnesty portion of S. 2008, the Council takes no position either in support of or in opposition thereto, leaving the way clear for Liner Council members to express their own views should they so desire.

If I could take off my Liner Council hat here and speak as president and chief executive officer of an American flag line, I am against any amnesty provisions in this bill whatsoever, broad. I think it is not necessary and I don't think it will be much use.

I am joined in this opinion by Mr. [illegible] Bros. Steamship Co. He is also the chairman of [illegible] and is unable to be here today. Also joining us [illegible]

dent of the Pacific Far East Lines, another American-flag steamship company, who is not a member of AIMS.

I have not discussed this matter with any other company president, so that there is no implication that if they were asked that they would not have the same opinion that I have.

Taking our amendment No. 1: By its very nature, rebating involves at least two parties; one who gives and one who receives an illegal inducement.

The rebate itself is not necessarily in cash. Indeed, it more commonly consists of the provision of service or other benefit contrary to the tariff and without charge to the shipper.

Since these rebates are illegal, they are frequently made through agents or affiliates of carriers and shippers so as to minimize involvement of the principals.

Thus, in order to effectively eliminate as much rebating as possible, we believe that the language in S. 2008 must be broadened to include insofar as possible, all persons who might be engaged in rebating.

Although the initial paragraph of section 16 relating to shippers applies to both shippers and related interests, it is not clear that its counterpart in section 16, the second paragraph, which is applicable to carriers, also applies to carrier agents and employees. Nor does section 18(b)(3) so apply.

Moreover, section 16 initial paragraph—which is the only section which might apply to shippers receiving rebates—is much narrower than section 18(b)(3), and there therefore is a question whether mere receipt of rebates by shippers is prohibited even in situations in which payment by carriers clearly violates the act.

We believe section 18(b)(3) should be broadened to include shippers and agents and employees of both carriers and shippers. Accordingly, we suggest the addition of a new section to S. 2008.

We recommend that the persons added to section 18(b)(3) by the foregoing provision may be made respondents in a proceeding brought under the provisions of section 2 of S. 2008.

Amendment 2, section 2(c) of S. 2008 does not require persons controlling, controlled by or under common control with a respondent carrier, to comply with reasonable and proper depositions, interrogatories, motions to produce or subpenas.

We believe that the records of such persons must be made available if the FMC is to effectively police rebating.

Similarly, shipper interests are not presently covered by section 2(c), but they and agents and employees of carriers will be included as the result of the amendment to section 18(b)(3) which we have proposed.

The enforcement provisions of the bill are deficient in that only the vessels of the respondent carrier are affected rather than all ships operated by the controlling, controlled or related companies.

Because of the severe impact of a finding of noncompliance with discovery, we have added a provision for expedited review of the compliance issue before the full Commission. Finally, we believe a carrier should not be barred from service for refusal by its agent to comply with discovery procedure if it terminates the agency promptly upon notice of such noncompliance.

Conversely, an agent who may represent a number of carriers or himself be a carrier, should not have all tariffs which he has on file for other principals or himself, suspended because of a refusal to comply by one carrier principal that he represents.

The agent should be permitted to protect himself by terminating his relationship with the offending carrier. We suggest contracts with agents be written or amended to enable the carrier principal or the agent to terminate the agency in the event the carrier principal or the agent refuses to comply with discovery orders.

Amendment 3, our third recommendation is that an entirely new section be added to S. 2008 to require that all common carriers and shippers be required to certify under oath that they are using diligence to insure that they are in compliance with the law. We believe that certification of compliance is an effective enforcement tool because responsible officials of carriers and shipper interests will not falsely certify under oath that they are in compliance.

Last July 26, AIMS Liner Council members sent the chairman of this subcommittee and other Members of Congress, a draft antirebating bill that is quite similar to the antirebating provisions of S. 2008. Our draft included a section requiring certification of compliance with the law.

Since our July recommendation, the Senate and House conference on the MARAD fiscal year 1978 authorization bill, adopted an amendment requiring certification by carriers having operating differential subsidy contracts.

We believe that this amendment is inequitable and unfairly discriminates against ODS contractors because it does not apply antirebating sanctions to non-ODS U.S.-flag or any foreign-flag carriers.

We believe that the record is clear that the carriers in these latter two categories have been primarily responsible for rebating abuses. However, because of our conviction that antirebating legislation is necessary, members of the AIMS Liner Council have not opposed the limited certification amendment at any time since it was originally recommended by Representative McCloskey.

We believe that this limited certification amendment provides a sound basis for a certification requirement that applies to all common carriers engaged in the foreign trade of the United States and to all shippers utilizing those carriers.

The balance of this statement consists of statutory language which I will not read.

This, therefore, concludes the statement of the AIMS Liner Council. Thank you very much.

[The amendments referred to follow:]

"Section . Section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817) is amended by striking the portion thereof preceding the first proviso clause and inserting in lieu thereof.

As used in this sub-paragraph the term "common carrier" means a common carrier by water in foreign commerce, any contractor or affiliate acting for or on behalf of such carriers, and any officer, agent, or employee thereof, and the term "shipper" means a shipper, consignor, consignee, forwarder, broker, or other person, and any officer, agent, or employee thereof. No common carrier shall charge, demand, collect or receive, and no shipper shall pay or remit, a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified

in the carrier's tariffs for such transportation or service on file with the Commision and duly published in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny in accordance with such tariffs; nor shall any such shipper collect, receive or accept in any manner or by any device any portion of the rates or charges so specified or collect, receive, or accept any privilege or facility, except in accordance with such tariffs or the further provisions of this subparagraph."

* * * * * * *

The various perfecting changes we suggest in subparagraph (c)(2) beginning at page 3, line 3 of S. 2008 read as follows: [deletions are shown in brackets and new material is italic.]

"(2) Failure on the part of any person, respondent to a proceeding instituted pursuant to subsection (c)(1), *or any other person directly or indirectly controlling, controlled by, or under common control with such respondent,* to comply with *reasonable and proper* depositions, [written] interrogatories, [discovery procedure] *motions to produce,* or subpoenas [herein "discovery procedure"], *regularly* issued in relation to an investigation or hearing held under an order issued by the Commission under subsection (c)(1) shall:

"(A) Toll the time within which the Commission shall issue a final order as provided in subsection (c)(1). *If such failure is on the part of a respondent carrier, or any other person directly or indirectly controlling, controlled by or under common control with such respondent,* the Commission *may* [shall] immediately *issue a notice directing the suspension on a date specified by the Commission of* [suspend, with out hearing,] all tariffs pursuant to section 18 of this Act by, or on behalf of, (a) said respondent carrier [or] *and* any *other* carrier directly or indirectly owned, controlled, *controlling, or under common control* [or affiliated] with that respondent carrier, and *upon certification of such suspension by the Commission to the Commissioner of Customs* the vessels of that respondent carrier *and any common or contract carrier directly or indirectly owned, controlled, controlling, or under common control with that respondent carrier* shall be denied entry into any United States port until that respondent carrier *or other person* has fully [responded to] *complied with* the [deposition, written interrogatories,] discovery procedure [or subpoena] involved, and the Commission has issued its order in the proceeding, *provided however that* vessels of [that respondent] *any such* carriers in voyage shall be *nevertheless* permitted to enter United States ports for the purpose of discharging cargo [not withstanding that the carriers tariff has been suspended]; *provided further, no tariff shall be suspended nor entry to United States ports be denied with respect to any vessel for non-compliance with such discovery procedure by a carrier's foreign agent if the agency is terminated promptly upon notice of such non-compliance by the Commission to the carrier principal. Any carrier receiving a notice of suspension of tariffs may demand a hearing before the full Commission pursuant to rules which the Commission shall establish, to determine whether there has been a failure of compliance with the discovery procedure, and if so whether the procedure was reasonable and proper and regularly issued. All incidents of such a hearing including decision thereon, shall be completed prior to the suspension date set forth in the notice. An order of suspension shall be considered a final order of the Commission for the purpose of the Administrative Procedure Act and appeals thereunder; provided however, that no interlocutory stay of the order of suspension shall be ordered by any court except upon a showing by a carrier seeking review of the order of suspension, that it is likely to succeed in establishing invalidity of the order.* Any carrier whose tariffs have been suspended pursuant to this subparagraph *or whose ships have been denied entry to United States ports,* and who provides *or offers to provide* [common carrier by water] service in the foreign commerce of the United States, except for completing voyages in progress, shall be subject to a civil penalty of not less than $25,000 and not more than $50,000 for each day of such service *or offer* continues."

* * * * * * *

We therefore urge the addition of the following new section to S. 2008:

"Sec. 5 Within 90 days of the enactment of the Shipping Act Amendments of 1977, the Commission shall promulgate final rules and regulations requiring (1) the chief executive of each common carrier by water in foreign commerce pe-

riodically to certify under oath to the Secretary of Commerce that he is using and will use reasonable diligence to insure that no company owner, employee, or agent will pay any rebates which are illegal under the Shipping Act of 1916 and will fully cooperate with the Federal Maritime Commission in its investigation of illegal rebating in the United States foreign and domestic trades, and in its efforts to end such illegal procedures; and (2) a responsible officer of the shipper, consignor or consignee to certify under oath that it is using and will use reasonable diligence to insure that it is paying filed tariff rates without rebates, allowance, absorption or concession and that it will fully cooperate with the Federal Maritime Commission in any investigation of illegal rebating in United States foreign and domestic trades and in its efforts to end such illegal procedures. As a matter of administrative convenience the certification required herein of shippers, consignors or consignees, may be required to be made as part of the documentation furnished to or required by another agency of the United States."

Senator INOUYE. If I may begin with the last section.

As you know, I was involved with the MARAD Authorization Conference. The Senate measure had no mention of the McCloskey language. The final language that we agreed upon, I believe had the intention of requiring reasonable diligence instead of the strict compliance as set forth in the McCloskey language.

I also realize that it applies only to those who are receiving the subsidy payments. And I argued that therefore this proposal was unfair to the carriers under those contracts, because it had no application for foreign carriers, or nonsubsidized U.S. carriers.

If you would look at the proposal, it is not effective until 240 days after enactment. This was done in order to give Congress time to enact S. 2008 or similar legislation.

Mr. SMITH. Yes, sir, I saw that.

Senator INOUYE. We would hope that within that time we could come out with something that would make that section moot. And that is our hope at the present time.

Mr. SMITH. I don't think, Mr. Senator, that we have any—I, personally, have no objections to signing such a thing. But I would like to see it spread, naturally. As you indicated, it would be much better if everyone who is in the operating business were to sign it.

Senator INOUYE. Oh, I fully concur with you. That is the very reason I am here. I am convinced that, as the Chairman of the FMC indicated, notwithstanding the intent of our laws, the practical application of the law does not touch, for the most part, foreign carriers.

What we are trying to do is to make certain that if we do have laws, they will be evenly applied; and if sanctions are applied, they will be evenly applied; if fines are applied, they be applied in the same manner.

It is not easy. I think the record shows very clearly that the agencies of the Government mandated by the laws of the land to carry out the policy as set forth in the Shipping Act, have not carried out this policy. So it was felt that something had to be done.

As I indicated yesterday, the time for talking has come to an end, and I think it is time to act. This committee intends to act.

The proposals submitted by your organization, as far as I can see, area reasonable. I will give them further study, I can't see any reason why we cannot accept them. But, as you indicated, they are very technical.

It was not our intention to take on just the carriers and leave out the shippers. I think if you are going to use an even hand, it should be used among all parties, the payer and the payee.

And your amentment relating to the agents, I think is a very reasonable one, to permit the agent, upon notice of noncompliance to sever relationship, and that should be sufficient. I think that makes good sense, unless the agent was aware of the illegal activities.

Mr. SMITH. That is right.

Senator INOUYE. Won't you agree with that?

Mr. SMITH. Yes, sir.

Senator INOUYE. I know you have to catch a plane. We have a few questions we would like to submit to AIMS.[1] Not too many.

Mr. SMITH. We would be glad to handle them, sir.

Senator INOUYE. And if you can respond to them, I would appreciate it very much.

Mr. SMITH. Thank you very much.

Senator INOUYE. Our next witness is the General Counsel of the Securities and Exchange Commission, Mr. Harvey Pitt.

Mr. Pitt, welcome, sir.

STATEMENT OF HARVEY L. PITT, GENERAL COUNSEL, SECURITIES AND EXCHANGE COMMISSION; ACCOMPANIED BY ALAN ROSENBLAT, ASSISTANT GENERAL COUNSEL; AND MICHAEL E. BLOUNT, ATTORNEY

Mr. PITT. Thank you, sir.

Senator INOUYE. Mr. Pitt, will you introduce your colleagues, before you proceed?

Mr. PITT. Yes, Senator. On my left is Alan Rosenblat, Assistant General Counsel of the Commission, and on my right is Michael Blount, an attorney in my office—the Office of the General Counsel of the Commission.

Senator INOUYE. Please proceed, sir.

Mr. PITT. I appreciate the opportunity to appear before the subcommittee today to offer the Commission's views on S. 2008, a bill that would amend the Shipping Act of 1916.

Copies of my prepared remarks have already been delivered to the subcommittee, and with the Senator's permission, I will summarize the salient points in my remarks.

Senator INOUYE. Without objection, your full statement will be made a part of the record.

Mr. PITT. Thank you.

As you are aware, S. 2008 is intended to remedy the serious problems of rebating and other malpractices facing this country's shipping industry.

The bill would amend the Shipping Act by providing for improved hearing, investigatory, and enforcement procedures by the FMC to deal with these improper practices. To remedy problems in existing law, the bill provides a 3-year period within which the Federal Government could reach a permanent solution for the problems of rebating and other malpractices in the foreign ocean trades.

[1] See p. 177.

Among other things, S. 2008 provides that any shipper or other person subject to the Federal Maritime Commission's jurisdiction must respond fully to an order directing a hearing and investigation into rebating or other malpractice allegations. And failure to so respond fully would carry significant penalties with it, including the possible denial of entry to any U.S. port.

Similarly, in order to encourage full disclosure of rebative practices and to stimulate FMC recommendations for corrective action—at least as we understant it—section 3 of S. 2008 would also grant the effective equivalent of a 1-year amnesty from criminal prosecution under any Federal law to any shipper or carrier that voluntarily discloses to the Federal Maritime Commission any practices violative of the Shipping Act. This amnesty provision would apply, however, to rebative acts committed prior to the enactment of S. 2008, and only if the discolsure is made prior to the time the person making the disclosure had actual notice that it was the subject of an investigation relating to that violation by an agency of the Federal Government.

Our Commission's expertise stems from its responsibility under the Federal securities laws to insure appropriate disclosure by publicly held corporation. Because companies engaged in the shipping industry are often publicly held, the disclosure provisions of the Federal securities laws apply to those companies as well.

In administering the disclosure provisions of the Federal securities laws, as I will shortly dicsuss in more detail, the Commision has been aggressive in requiring publicly owned companies to disclose questionable or illegal payments. Indeed, I might add—and I will describe to some extent what our program has been—it is that exposure which induced R. J. Reynolds to come forward and disclose Sea-Land's rebative practices.

Despite the salutory goals that may have prompted the provisions of section 3 of S. 2008, establishing 1-year blanket immunity from criminal prosecution under Federal statutes, the Commission has serious concerns that that provision may vitiate the effectiveness of its ongoing enforcement activities under the Federal securities laws. Those activities, I might add, have shown to be quite effective in ferreting out questionable and illegal practices.

Accordingly, while the Commission generally endorses the intent and substance of S. 2008, we strongly recommend the deletion or modification of section 3 of the bill.

As the Senator is aware, the disclosure provisions of the Federal securities laws are designed to provide the shareholders of publicly held companies and the investing public, with truthful and adequate financial and other material information which may be used as a basis for investing in the securities of such companies, or as a basis for corporate shareholders to exercise their voting rights in selecting corporate management and making important corporate decisions.

The Commission also has authority and responsibility for enforcing statutory provisions and adopting rules prohibiting fraudulent and deceptive practices in connection with securities transactions.

In this context, the Commission has for sometime been quite concerned with the problem of questionable and illegal corporate payments and practices.

A basic discussion of our concerns was set forth in the report that our Commission submitted to the Senate Banking, Housing, and Urban Affairs Committee on May 12, 1976, and which was published as a committee print.

In that report, we noted that, as a direct consequence of the Commission's vigorous enforcement of these disclosure provisions, publicly owned companies had disclosed questionable or illegal corporate payments, the most common of which involved payments to foreign officials.

A significant number of companies disclosed activities that involved so-called foreign matters, and many of the matters disclosed appeared to have constituted some form of commercial bribery.

Particularly disturbing was the high number of instances in which some members of corporate management were involved in, or had knowledge of, the activities reported, including the falsification or inadequate maintenance of corporate records in an attempt to conceal questionable or illegal conduct.

Under the Federal securities laws such questionable or illegal payments that are significant in amount, or even if not significant in amount, that relate to a significant amount of business are material to investors and shareholders and must be disclosed. And, where these payments involve corporate officers acting without the knowledge of the board of directors, suggesting the improper exercise of corporate authority, such occurrences are relevant to the quality of corporate management and must be disclosed to shareholders in proxy materials.

Even where payments of this nature are expressly approved by corporate directors, the resulting impact on the corporation may far exceed the immediate significance of the payment itself, or even the business dependent upon it, as for example where such payments are effected off the books and records of the company outside the normal channels of corporate accountability.

The Commission has been concerned with the existence of false books and records, corporate slush funds, and other practices enabling certain directors or officers to utilize corporate funds without the normal checks of corporate accountability, since these are matters requiring disclosure under the Federal securities laws.

In essence, those members of the public who allow public corporations the use of their funds have the right to know that these corporations are utilizing the funds in a manner unchecked and unverifiable by their auditors or by others.

Cognizant of the desirability of broad disclosures of this kind of corporate conduct, the Commission has encouraged publicly held companies to make disclosures voluntarily, utilizing procedures traditionally open to any company. Thus, when public companies have novel or significant disclosure problems, the Commission encourages those companies to come to our staff, discuss the matters with the staff, and see whether advice can be given as to appropriate disclosures, thereby avoiding the need for enforcement action.

This procedure has resulted in more than 400 companies coming to the Commission's staff, discussing the situation, and making appropriate disclosures in Commission filings. And, I might add, these are some of the largest companies in the world.

A significant number of these companies have also conducted internal investigations to go beyond the information they had already made publicly available.

Such voluntary disclosure, however, does not immunize and has not immunized, these companies against Commission enforcement action, although the Commission, taking a pragmatic approach to the problem, has recognized that, in many cases, a company's voluntary disclosure may lessen or even, in some cases, eliminate the need for enforcement proceedings.

This voluntary procedure, which is applied on a case-by-case basis, is supplemented by the Commission's enforcement resources and, with companies participating in the program permitting our staff direct access to their records, has proven quite effective. In the process, however, the Commission has also found it appropriate to institute over 30 injunctive actions—civil actions in Federal courts—which not only resulted in the imposition of injunctions against the offending companies and many of their officers and directors, barring them from repeating this kind of conduct, but perhaps more importantly also has resulted in the imposition of ancillary equitable remedies. Those remedies encompass, among other things, the selection of new and independent boards of directors, the imposition of new corporate procedures, and in many cases the appointment of special counsel to investigate the situation and the extent of prior improper corporate practices.

Many companies have appointed new boards of directors—fresh management coming in to eliminate these kinds of practices.

Both the Commission's voluntary disclosure program and its enforcement activities have involved companies engaged in ocean shipping activities. For example, the Commission recently brought a civil injunctive action against United States Lines, Inc., alleging various violations of the antifraud provisions of the Federal securities laws in connection with that company's payment of substantial improper and illegal payments totaling in excess of $2½ million, most of which involved illegal rebates to shippers, together with fictitious entries in corporate books and the maintenance of certain funds off the company's books and records.

In another case, the Commission filed suit against Gamble-Skogmo, Inc., and certain other named defendants in connection with the illegal receipt of rebate payments made to one of its subsidiaries, Gamble Imports Corp. Both of these cases resulted in the imposition of civil injunctions prohibiting future violations of the Federal securities laws upon consent of the companies.

With respect to the Gamble-Skogmo action, two of the individuals named in that complaint are still litigating the case with the Commission.

I should also add that several companies involved in shipping activities have voluntarily disclosed these kinds of activities.

The Commission's involvement with disclosures by ocean carriers and shippers of improper or illegal payments began in May 1976 with the disclosure by R. J. Reynolds, that its ocean carrier subsidiary, Sea-Land Services, had engaged in questionable practices, including the payment of rebates in violation of Federal law.

The company announced that it was commencing an investigation voluntarily to uncover the details of these practices.

The Commission's staff, at the same time, began informally to investigate other companies, both carriers and shippers. Information provided by R. J. Reynolds was very helpful to us in pursuing that investigation.

In September of 1976, R. J. Reynolds announced that its investigation was completed. It concluded, based on its own independent study, that more than $19 million in possibly illegal ocean rebates had been paid by Sea-Land. No immunity from civil or criminal prosecution was promised to Reynolds, nor did the company seek such immunity.

As I have mentioned, even before Reynolds' public disclosures in September of 1976, the Commission's staff commenced a series of inquiries of various publicly held shippers and carriers, initially utilizing the information that Reynolds provided, to determine the extent of rebates received from carriers, both domestic and foreign, and in particular, the manner in which those shippers and carriers had treated the receipt of such rebates on their books and records.

Many shippers responded to the Commission's inquiries by coming forward with public disclosures. The process of investigation, both formal and informal, and the process of public disclosure continues. Commission enforcement action involving shippers as well as carriers remains a distinct possibility.

As the foregoing discussion evidences, however, promises of immunity have not been necessary in order to promote public disclosure in this area, and the Commission's public files already contain a spectrum that is fairly broad of information about the kinds of practices of this nature that have been employed in the shipping industry.

And, of course, our records and files are available to the FMC.

In this context, therefore, we are concerned with the effect that section 3 of S. 2008 might have on our administration of the Federal securities laws. That section, as presently drafted, would not permit the criminal prosecution of individuals for violation of U.S. laws including, by implication, the Federal securities laws, where disclosure of the illegal payment activity was made to the FMC pursuant to the provisions of the bill and prior to the time that those individuals had actual notice that they were the subject of an investigation relating to the act disclosed.

Where potential violations of U.S. laws other than the ones this Commission administers are discovered we refer the matter to the appropriate law enforcement agency for action.

Section 3 of the bill would effectively prevent the pursuit of criminal investigations by other agencies resulting from information discovered by our staff, by removing the possibility of eventual prosecution in the area covered by the bill, including prosecutions by the Justice Department for violations of the Federal securities laws.

In that context I should add that our Commission litigates its own civil injunctive actions, but with respect to criminal matters we must refer the matter to the Justice Department, which handles criminal enforcement for us.

While we recognize the concerns that prompted section 3 as drafted, we believe that this provision could effectively deny public investors

and shareholders material corporate information. In this vein, I think it important to note that claims of competitive disadvantage—the factor that apparently motivated section 3 of 2008 and which we recognize is a real concern—have been voiced by many American companies engaged in a variety of occupations, not just by those companies engaged in ocean shipping and related occupations. But, improper rebates, kickbacks, and bribes are unlawful whether or not foreign companies also employ such tactics.

The answer to the competitive problems raised is not, in our view, to reduce all companies to the lowest common denominator, but rather it is to utilize the legislative process, as S. 2008 otherwise seeks to do—and quite effectively we believe—to assert the full range of American jurisdiction to alleviate any competitive advantages foreign companies might otherwise obtain as a result of lax foreign legal standards.

On balance, therefore, we do not believe that the important purposes of the bill would be lost if this immunity provision were deleted.

S. 2008 might also have the effect of implying that once disclosure is made to the Federal Maritime Commission under this bill, a corporation may be relieved of its obligation to disclose the same information in public filings with the Commission. A case-by-case approach preserving prosecutorial discretion within the overall objectives of the bill would acheive the desired result without the adverse consequences resulting from immunity.

This same result might also be achieved, alternatively, by providing for increased penalties after the first year rather than the present grace period.

In any event, even if some immunity provision is retained, the present one would make criminal prosecution difficult even where warranted and contemplated by S. 2008. Thus, the provision that actual notice of investigation have been received by would-be defendants would create serious evidentiary problems, likely vitiating the capacity of the Government to prosecute criminally even in appropriate cases.

Moreover, the so-called requirement that actual notice be given in order to preclude immunity might prematurely prejudice the Government's ultimate prosecution of an egregious criminal case, including prosecution against persons not entitled to rely on section 3 of S. 2008.

Finally, the express preservation of civil liability provided by section 3(5) of the bill for FMC agreements, creates an ambiguity concerning our Commission's capacity to continue to pursue violations of the Federal securities laws by civil injunctive actions. At a minimum, therefore, we strongly urge that the bill make clear that our Commission may continue its important activities in the civil forum.

In summary, the Commission has been able to obtain adequate disclosure for investors and enforce the statutory provisions and rules prohibiting fraudulent or deceptive practices in connection with securities transactions in this important area.

We endorse the general thrust of S. 2008, but we believe that the blanket criminal immunity that would be granted in this bill could adversely affect the Commission's ability to carry out this congressional mandate, certainly a result not intended.

I appreciate the opportunity to participate in these hearings, and of course I shall be happy to respond to any questions that you might have, Senator.

99-539—77——7

Senator INOUYE. Well, I thank you very much, Mr. Pitt.

Before proceeding, I would like to ask you if you would share your expertise with us and provide some suggested language for amendments?

Mr. PITT. We would be most happy to do that, and we will draft something and submit it to staff counsel.

[The following information was subsequently received for the record:]

1. On page 3, of your statement you "strongly recommend the modification or deletion" of the amnesty provision of S. 2008. Subsequently, you elaborate on the reasons for your misgivings.

The Department of Justice which testified yesterday also has misgivings. Consequently, the committee has requested the Justice Department to submit an alternative, acceptable use immunity provision by October 20.

Would you please give your views to Mr. Ledebur of the Department of Justice, so that the Department may have the benefit of them in drafting alternative language for the committee?

SECURITIES AND EXCHANGE COMMISSION,
Washington, D.C., November 3, 1977.

Re S. 2008, amendments to the Shipping Act of 1916.

Hon. DANIEL K. INOUYE,
Chairman, Subcommittee on Merchant Marine and Tourism, Committee on Commerce, Science and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: On October 13, 1977, Harvey L. Pitt, Esq., General Counsel of this Commission, testified before your subcommittee on S. 2008, Amendments to the Shipping Act of 1916 (the "Bill"). At that time, you requested that the Commission provide your subcommittee with certain information regarding the disclosure of illegal rebate payments and other malpractices in the ocean trades uncovered through the operation of our voluntary disclosure program. We have forwarded this information to you under separate cover.

Additionally, you requested that the Commission provide amendments to the Bill consistent with our position on the amnesty provision contained in Section 3. In accordance with your suggestion at the hearing, we have coordinated our efforts with the Department of Justice.

As indicated by Mr. Pitt in his testimony, we join the Department of Justice in opposing the one-year grace period from criminal liability provided for in the Bill. Based on the results obtained by this Commission through our ongoing voluntary disclosure program, we believe that the retention of prosecutorial discretion within the overall objectives of the Bill, or, in the alternative, increased penalties after the first year, would provide sufficient incentive to encourage disclosure without infringing upon the jurisdiction of other agencies.

If, however, the Congress determines that an immunity provision is necessary, then we believe it should be limited to violations of the Shipping Act of 1916. Therefore, we suggest that subsection (d)(1) of Section 32 of the Shipping Act of 1916 be amended to read:

"(d)(1) Subject to the provisions of paragraph (2), no penalty shall be imposed on any person under Section 16 (other than paragraphs First and Third) in foreign commerce of section 18(b) for any act which may be a violation of either section if—

"(A) such act occurred before the date of enactment of this subsection; and

"(B) within one year after the date of enactment the person who committed such act had made a good faith disclosure thereof to the Commission without knowledge that it was the subject of an investigation relating to such act by any agency of the Federal Government."[1]

We understand that the Justice Department opposes amnesty for acts disclosed prior to the date of enactment of the Bill. Nonetheless, if the legislation provides for amnesty, we would not oppose the application of amnesty for acts disclosed prior to such enactment.

In addition to the Commission's concern with the amnesty provision we are also troubled by the present wording of subsections (d)(2) and (d)(5) con-

[1] Modifications are indicated by underlining. Lines 23–25 on page 4 and lines 1–4 on page 5 of the Bill are stricken.

tained in Section 3 of the Bill with respect to the establishment of the amount of civil penalty applicable to a person making disclosures under these provisions.

Subsection (d) (2), inter alia, requires that, under certain circumstances, the Federal Maritime Commission shall establish amounts of compromised civil penalties and other sanctions to be paid and incurred by persons who make disclosures of violative acts, and subsection (d) (5) would preserve the effectiveness of such compromised penalties. Because of the way these subsections are written, however, they may create an ambiguity concerning the Commission's capacity to continue to pursue violations of the federal securities laws by civil injunctive actions, and concerning the capacity of other federal agencies to pursue violations of the laws under their jurisdiction. Therefore, we suggest that subsection (d) (5) be amended to read:

"(f) Nothing in this subsection shall be construed as—

"(*A*) abrogating or rescinding any civil penalties under any agreements now signed with the United States under section 3 of the Act of August 29, 1972 (making amendments to the Shipping Act, 1916); *or*

"(*B*) *affecting the administration or enforcement, by an agency of the Federal Government, other than the Federal Maritime Commission, of the laws of the United States within the jurisdiction of such agency, or affecting the establishment of any sanction or penalty under such laws.*[2]

If you need further assistance in this matter, please let me know.

Sincerely,

PAUL GONSON,
Associate General Counsel.

Senator INOUYE. We have asked the Justice and State and FMC to do the same. If you would like to work with them, that would be fine.

It is not our intention to let people go scot-free for violating the laws. What we are trying to do is to provide an interim measure that would provide a mechanism to come up with a solution. And, so, I am not in any way suggesting that this is the best way to do it.

Now, in your voluntary disclosure program, by voluntary I would gather you mean that these companies were not under any sort of investigation? They came clean without the hot breath of Government on their necks?

Mr. PITT. That is correct.

Senator INOUYE. Now you say several. How many shipping companies have come forth and disclosed illegal payments?

Mr. PITT. I am not sure of the precise number. I think it is between 10 and 20, but I can provide that information for the subcommittee in its final record.

Senator INOUYE. And, has the FMC been advised of this?

Mr. PITT. Where we discern violations of other statutes, we alert other agencies. And, our staff has been in contact over the last 2 years with staff members of the Federal Maritime Commission.

Senator INOUYE. Now your Commission is not involved in foreign corporations, but as a result of your program, have you been able to stop malpractices carried out by foreign concerns?

Mr. PITT. First, let me respond by saying that foreign corporations can be subject to our jurisdiction if, among other things, their securities are publicly held or traded in this country. And, in fact, the securities of a number of foreign companies are held and traded here. In addition, American companies with foreign subsidiaries are subject to our jurisdiction.

In that context, we have disclosures made by companies that are foreign in nature, or subsidiaries of American companies that basically operate abroad.

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[2] Additions indicated by italic.

In addition, disclosures made by American multinational companies have had reverberating effects. The disclosures made by a number of these large companies have caused great concern in foreign countries about the conduct not only of our corporations, but also of their own corporations and members of their own official agencies and bodies. These disclosures have generally proved salutory in raising the consciousness and level of awareness of the problem of improper payments both here and abroad.

Senator INOUYE. Will you provide us with a memo covering these companies that have made voluntary disclosures to you——

Mr. PITT. We will be happy to do so.

Senator INOUYE [continuing]. Concerning malpractices.

Mr. PITT. Yes; we would be happy to do so.

Senator INOUYE. And the nature of the malpractice and action taken, if any.

Mr. PITT. Yes; we will be happy to supply that to you.[1]

Senator INOUYE. I appreciate your statement very much. I am delighted to see voluntary disclosure working in one section. But I am just wondering what would entice foreign concerns not under the jurisdiction, obviously, out of the reach of our Government, to come forth without some sort of enticement. I am trying to come forth with a measure that would be evenhanded for all concerned. As the FMC suggested, notwithstanding the intent of our law, the practical application of the law does not affect foreigners in any significant manner.

Mr. PITT. If I may, comment further Senator, I think that the concern is a very real one. It is our view, however, that that goal evenhandedness and applicability to foreign countries can be effected—particularly in the shipping area where there are more tools at our disposal, perhaps, than other areas—by a variety of procedures without the need for amnesty.

For one thing, vigorous enforcement and stiff penalties with expanded authority for the FMC itself will provide an inducement. The fear of being caught in this activity without having made disclosure, and the fear of significant penalties, have, in our experience, proven to be the best inducement for voluntary compliance with the law.

In addition, in the administration of our own statutes, we have encountered problems with foreign secrecy laws and also problems with foreign corporations that have indicated an unwillingness to respond to agency subpenas. We have attempted to deal with those problems by drafting legislation that would utilize those elements of jurisdiction that are present in that country, to enable us to effect sanctions for those who do not comply.

For example, take the case of a corporation that has a transfer agent in this country and pays dividends here. We are proposing that if a foreign investor or entity which owns securities of that corporation does not respond to our subpena or request for information, we would be authorized to get a court order to prevent transfer of the securities owned by that person or entity and to prevent payment of dividends or interest from those securities. And there are other devices that can be used to make discovery procedures more effective and efficient.

[1] See p. 101.

Senator INOUYE. Of the 10 to 20 voluntary disclosures concerning illegal rebates, how many were as a result of the R. J. Reynolds voluntary disclosure?

Mr. PITT. First, let me say that the characterization of these 10 to 20 as being voluntary disclosures may not be entirely accurate, since our staff had begun to look at this area at around the time of the Sea Land disclosure.

In addition, after the Sea Land disclosures, we contacted the companies that were implicated in those disclosures, and I would say that most of the disclosures emanated initially from those contacts.

Again, I would stress the fact that R. J. Reynolds did come forward as a volunteer without any promises of immunity at all.

Senator INOUYE. So, if it were not for the R. J. Reynolds disclosure, some of the subsequent voluntary disclosures might not have been forthcoming?

Mr. PITT. I think that those disclosures might have taken longer to surface, but my judgment, based on the way our enforcement program has operated, and the effectiveness of our enforcement staff, is that we would have uncovered this kind of activity at some point. Once it became apparent to us that this activity was more widespread than any of us had anticipated, we conducted a very, very vigorous enforcement effort. And, as I have indicated, we found many of these companies by ourselves, without voluntary disclosures.

Senator INOUYE. Are you convinced that this is widespread in industry?

Mr. PITT. With respect to the shipping industry it is hard to say. I do not purport to have special expertise about that industry. I would have to say, however——

Senator INOUYE. Well, one witness last March suggested that most, if not all of the companies involved in foreign commerce in the United States, are involved to some degree in rebating or malpractices of one sort or another.

Mr. PITT. I was about to say, in that context, that with disclosure by 400 companies in all areas, this number is sufficiently large to persuade me that these practices are probably widespread in the shipping industry.

Our disclosures have shown that questionable or illegal practices are not confined to particular industries, but unfortunately, appear to have been far more persuasive than we had originally assumed.

Senator INOUYE. Well, I thank you very much, sir.

Mr. PITT. Thank you, Senator.

[The statement follows:]

STATEMENT OF HARVEY L. PITT, GENERAL COUNSEL, SECURITIES AND EXCHANGE COMMISSION

Mr. Chairman and members of the subcommittee, I appreciate the opportunity to appear before the subcommittee today to offer the Commission's views on S. 2008, a bill that would amend the Shipping Act of 1916. The bill, which was introduced by the Chairman of this Subcommittee, is intended to remedy the serious problems of rebating and other malpractices facing this country's shipping industry. In essence, the bill would amend the Shipping Act by providing for improved hearings, investigatory and enforcement procedures by the Federal Maritime Commission to deal with the improper and illegal payment of rebates, and other malpractices in the United States ocean trades. As the Subcommittee

is aware, the Shipping Act of 1916, among other things, already prohibits any carrier subject to the jurisdiction of the Federal Maritime Commission from offering any direct or indirect monetary inducement to attract cargo that departs from the rates contained in the published tariff. These amendments to the Shipping Act of 1916, which the Subcommittee is considering today, are deemed necessary, however, because—

(1) the Federal Maritime Commission's efforts have been severely hampered by the lack of a concerted federal effort and the inadequacies of agency resources;

(2) existing laws are inadequate to regulate effectively the foreign flag carriers that transport the vast majority of the export-import commerce in this country's ocean lines trades; and

(3) usually the enforcement action that has been taken has been confined only to those limited malpractices falling within the purview of existing law that have been engaged in by American flag carriers, creating competitive disparities between American and foreign shippers.

THE PROVISIONS OF S. 2008

To remedy these shortcomings in existing law, the bill before the Subcommittee would provide a three-year period within which the federal government could reach a permanent solution for the rebating and other malpractices in the foreign ocean trades. Thus, among other things, S. 2008 provides that any shipper or other person subject to the Federal Maritime Commission's jurisdiction must respond fully to an order directing a hearing and investigation into rebating or other malpractice allegations. A carrier's failure to respond fully would carry significant penalties with it, including the possible denial of entry to any United States port.

Similarly, in order to encourage full disclosure of rebative practices and to stimulate Federal Maritime Commission recommendations for corrective action, S. 2008 also would grant the effective equivalent of a one-year "amnesty" from criminal prosecution under any federal law to any shipper that voluntarily discloses to the Federal Maritime Commission any practices violative of the Shipping Act of 1916. This "amnesty" provision would apply, however, to rebative acts committed prior to the enactment of S. 2008, and only if the disclosure is made prior to the time the person making disclosure had actual notice that it was the subject of an investigation relating to that violation by any agency of the federal government. The bill would also explicity preclude the abrogation or recission of civil penalties for in any agreement already signed with the United States on the effective date of the bill under the 1972 amendments to the Shipping Act of 1916.

BRIEF STATEMENT OF THE VIEWS OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission, of course, has no experience with, or responsibility for administering, the Shipping Act of 1916. In the context of the issues pending before this Subcommittee, our Commission's expertise stems from its responsibilities under the federal securities laws to ensure appropriate disclosures by publicly-held corporations, including those companies engaged in the shipping industry. In administering the disclosure provisions of the federal securities laws, as I will shortly discuss in more detail, the Commission has been aggressive in requiring publicly-owned companies to disclose their questionable or illegal payments. For that reason, the Commission favors legislation, such as S. 2008, that would compel or encourage the disclosure of questionable corporate activity. But, despite the salutory goals that may have prompted the provisions of Section 3 of S. 2008 that would grant foreign and domestic shipping companies one-year of blanket immunity from criminal prosecution under any provision of federal law, the Commission has serious concerns about the possible impact of that provision on the effectiveness of the Commission's ongoing enforcement activities under the federal securities laws. Accordingly, while the Commission generally endorses the intent of S. 2008, we strongly recommend the modification or deletion of Section 3 of that bill.

THE COMMISSION'S DISCLOSURE EXPERIENCES

As the Subcommittee is aware, the disclosure provisions of the federal securities laws are designed to provide the shareholders of publicly-held companies,

and the investing public, with truthful and adequate financial and other material information which may be used as a basis for investing in the securities of such companies, or as a basis for corporate shareholders to exercise their voting rights in selecting corporate management. Such information also can be used by the businesses community and the public to judge the financial condition on such companies for other purposes. The Commission also has authority to enforce statutory provisions and adopt rules prohibiting fraudulent and deceptive practices in connection with securities transactions. In this context, the Commission has, for some time, been very much concerned with the problem of questionable and illegal corporate payments and practices.

In a report submitted to the Senate Banking, Housing and Urban Affairs Committee, on May 12, 1976, the Commission reported that, as of that date, and as a direct consequence of the Commission's vigorous enforcement of the disclosure provisions of the federal securities laws, 95 companies had disclosed questionable or illegal corporate payments, the most common of which involved payments to foreign officials. Twenty-seven companies disclosed activities that involved "foreign matters," and many of the matters disclosed appear to have constituted some form of commercial bribery. Particularly disturbing was the high number of instances in which some members of corporate management were involved in, or had knowledge of, the activities reported, including the falsification, or inadequate maintenance, of corporate records in an attempt to conceal questionable or illegal conduct.

Under the federal securities laws, questionable or illegal payments that are significant in amount or, even if not significant in amount, that relate to a significant amount of business, are material to investors or shareholders, and must be disclosed. And, where these payments involve corporate officers acting without the knowledge of the board of directors, suggesting the improper exercise of corporate authority, such occurrences are relevant to the quality of corporate management, and should be disclosed to shareholders. Even where payments of this nature are expressly approved by a company's board of directors, the resulting impact on the corporation may far exceed the immediate significance of the payment itself, or the business dependent upon it, as, for example, where such payments are effected off the books and records of the company, outside the normal channels of corporate accountability. The existence of false books and records or corporate slush funds, or other practices enabling certain directors or officers to utilize corporate funds without the normal checks of the corporate accountability system, is a matter requiring disclosure under the federal securities laws.

Cognizant of the desirability of broad disclosures of this kind of corporate conduct, the Commission has encouraged publicly held companies to make disclosures voluntarily, utilizing procedures traditionally open to any company facing a novel disclosure question. As a result, more than 400 companies have come to the Commission's staff, discussed the situation, and made appropriate disclosures in Commission filings. A significant number of these companies have conducted internal investigations. Such voluntary disclosure, however, does not immunize a company against Commission enforcement action, although, in many cases, it may lessen the need for such proceedings. This voluntary procedure supplemented the Commission's enforcement resources and, with companies participating in the program permitting our staff access to their records, it has proven quite effective.

In the process, the Commission also found it appropriate to institute over 30 injunctive actions, which not only resulted in the imposition of injunctions against the offending companies and many of their officers and directors, but also resulted in the imposition of ancillary remedies, including, among other things, the selection of new, and independent, boards of directors, the imposition of new corporate procedures and, in many cases, the appointment of special counsel to investigate the extent of prior improper corporate practices.

Both the Commission's voluntary disclosure program and the Commission's enforcement activities have involved companies engaged in ocean shipping activities. For example, the Commission recently brought a civil injunctive action against United States Lines, Inc., alleging various violations of the antifraud provisions of the securities laws in connection with the making of substantial improper and illegal payments totaling in excess of two and one half million dollars, most of which involved illegal rebates to shippers, together with fictitious entries in corporate books and the maintenance of certain funds off the company's books.[1] In another case, the Commission filed suit against Gamble-

[1] *Securities and Exchange Commission* v. *United States Lines, Inc.*, Civil Action No. 77-2746 (United States District Court for the Southern District of New York).

Skogmo, Inc. and certain other named defendants in connection with the illegal receipt of rebate payments made to one of its subsidiaries, Gamble Imports Corporation.[2] Both of these cases resulted in the imposition of civil injunctions prohibiting future violations of the federal securities laws. Similarly, several companies involved in shipping activities have voluntarily disclosed these kinds of activities.

The Commission's involvement with disclosures by ocean carriers and shippers of improper or illegal payments began in May, 1976, with the disclosure by R. J. Reynolds Industries that its ocean carrier subsidiary, Sea Land Services, had engaged in practices, including the payment of rebates, in violation of federal law. The company announced that it was commencing an investigation to uncover the details of these practices. The Commission's staff, at the same time. began informally to investigate both carriers and shippers.

In September of that year, R. J. Reynolds announced that its investigation was completed; it concluded that more than 19 million dollars in "possibly illegal" ocean rebates had been paid by Sea Land. No immunity from civil or criminal prosecution was promised to Reynolds, nor did the company seek such immunity.

Even before the release of Reynolds' disclosure in September, 1976, the Commission's staff commenced a series of inquiries of varous publicly-held shippers and carriers, initially utilizing the information contained in Sea Land records, to determine the extent of rebates received from carriers, both domestic and foreign, and in particular the manner in which shippers had treated the receipt of such rebates on their books and records. Many shippers responded to the Commission's inquiries by coming forward with public disclosures. The process of investigation, both formal and informal, and the process of public disclosure, continues, and Commission enforcement actions involving shippers as well as carriers remain a distinct possibility.

As the foregoing discussion evidences, however, promises of immunity have not been necessary in order to promote public disclosure in this area, and the Commission's public files already contain a broad spectrum of information about the kinds of practices of this nature that have been employed in the shipping industry.

THE COMMISSION'S CONCERNS WITH S. 2008

In this context, the Commission is concerned about the effect Section 3 might have on its administration of the federal securities laws. Section 3 of the bill, as presently drafted, would not permit the criminal prosecution of individuals for violations of United States laws (including, by implication, the federal securities laws), where disclosure of the illegal payment activity was made to the Maritime Commission pursuant to the provisions of the bill and prior to the time that those individuals had actual notice that they were the subject of an investigation relating to the act disclosed.

Where potential violations of other United States laws are discovered in the course of Commission investigations, we refer the matter to the appropriate law enforcement agency for action. Section 3 of the bill would effectively prevent the pursuit of criminal investigations by other agencies resulting from information discovered by our staff, by removing the possibility of eventual prosecution in the area covered by the bill, including prosecutions by the Justice Department for violations of the federal securities laws.

While we recognize the concerns that prompted Section 3 of S. 2008, as drafted, this provision could effectively deny public investors and shareholders material corporate information. In this vein, it is important to note that claims of competitive disadvantage—the factor apparently motivating Secion 3 of S. 2008—have been voiced by many American companies engaged in a variety of occupations, and not just by carriers engaged in ocean shipping. But, improper rebates, kickbacks and bribes are unlawful, whether or not foreign companies also employ such tactics. The answer to the competitive problems raised is not, in our view, to reduce all companies to the lowest common denominator, but rather, is to utilize the legislative process, as S. 2008 otherwise seeks to do, to assert the full range of American jurisdiction to alleviate any competitive advantages foreign companies might otherwise obtain as a result of lax foreign legal standards. And, while this section of the bill purports to grant immunity only from criminal

[2] *Securities and Exchange Commission* v. *Gamble-Skogmo, Inc., et al.*, Civil Action File No. 77 C 3426 (United States District Court for the Northern District of Illinois, Eastern Division).

prosecutions, it is inherently ambiguous concerning its effect on civil injunctive actions. On balance, we do not believe that the important purposes of the bill would be lost if this immunity provision were deleted.

S. 2008 might also have the effect of implying that once disclosure is made to the Federal Maritime Commission under this bill, a corporation is relieved of its obligation to disclose the same information in public filings with the Commission. A case-by-case approach, preserving prosecutorial discretion within the overall objectives of the bill, would achieve the desired result without the adverse consequences resulting from immunity. This same result might also be achieved by providing for increased penalties after the first year rather than the present grace period.

In any event, even if some immunity provision is retained, the present one would make criminal prosecution difficult, even where warranted by S. 2008. Thus, the provision that actual notice of investigation have been received by would-be defendants would create serious evidentiary problems likely vitiating the capacity of the government to prosecute criminally even in appropriate cases. Moreover, the "requirement" that actual notice be given to preclude immunity might prematurely prejudice the government's ultimate prosecution of a criminal case, including a prosecution against persons not entitled to rely on Section 3 of S. 2008. Finally, the express preservation of civil liability provided by Section 3(5) of the bill, for Maritime Commission agreements, creates an ambiguity concerning the Commission's capacity to continue to pursue violations of the federal securities laws by civil injunctive actions. At a minimum, therefore, we strongly urge that the bill make clear that the Commission may continue its important activities in the civil forum.

CONCLUSION

In summary, the Commission has been able to obtain adequate disclosure for investors and enforce the statutory provisions and rules prohibiting fraudulent or deceptive practices in connection with securities transactions in this important area. While we endorse the general thrust of S. 2008, we believe that the blanket criminal immunity that would be granted in this bill could adversely affect the Commission's ability to carry out its Congressional mandate.

I appreciate the opportunity to participate in these hearings and, of course, I shall be happy to respond to any questions the members of the Subcommittee might have.

[The following information was referred to on p. 96:]

SECURITIES AND EXCHANGE COMMISSION,
Washington, D.C., November 2, 1977.

Re S. 2008, amendments to the Shipping Act of 1916.

Hon. DANIEL K. INOUYE,
Chairman, Merchant Marine and Tourism Subcommittee,
U.S. Senate, Washington, D.C.

DEAR SENATOR INOUYE: On October 13, 1977, Harvey L. Pitt, General Counsel of this Commission, testified before your Subcommittee on S. 2008, a bill that would amend the Shipping Act of 1916. At that time, you requested that we provide the Subcommittee with certain information regarding the public disclosures made by companies subject to the Shipping Act of 1916, concerning the payment or receipt of illegal ocean rebates and other malpractices in the ocean trades.

The enclosed chart summarizes information disclosed in public filings made with the Commission. The chart lists (1) the companies, (2) the manner in which the disclosures were made, (3) the period of time covered by the disclosures, (4) the amount of the rebates, (5) the accounting treatment used, (6) the knowledge of top management regarding rebate activity within their companies, and (7) other relevant information.

If you need any additional information, please let me know.

Sincerely,

PAUL GONSON,
Associate General Counsel.

SECURITIES AND EXCHANGE COMMISSION SUMMARY OF PUBLIC DISCLOSURES MADE BY SHIPPERS AND CARRIERS OF REBATES AND OTHER MALPRACTICES IN THE OCEAN TRADES[1]

Company	Form of disclosure	Period covered	Amount of rebates disclosed	Accounting treatment	Knowledge of top management	Disposition of rebates and other relevant information
SHIPPERS						
1. Action Industries, Inc.	Form 8-K, reflecting audit of subsidiary company, Action International, Ltd.	Fiscal 1970-76	$419,282	Entered on companies' books.	N D[2]	Total unrecorded rebates disposed of as follows:
			97,063	Unrecorded		(1) $70,531 cash paid over to other shippers for whom company was agent. (2) $12,500 cash returned to carrier. (3) $14,032 cash paid out for equipment and customs charges to Taiwan Government. Approximately $20,000 received by the company for freight shipped between foreign ports independent of an unrelated to freight charges for U.S. shipments.
2. Arlen Realty & Development Corp.	Form 8-K resulting from internal investigation by audit committee.	Last 5 fiscal years ending Feb. 28, 1977.	635,115	Payments reflected on books of Hong Kong subsidiary and credited to "sundry income account."	N D	Amount shown is total of "sundry income account," what portion actually represents ocean rebates is unknown.
3. Gamble-Skogmo, Inc.	Form 8-K resulting from internal investigation of audit committee.	Last 3½ yr.	249,000	Existence of payments was concealed from parent company and not recorded on books of company or its subsidiaries.	N/D	Cash received was retained by employees or paid to other employees of subsidiary for their personal use. On Sept. 15, 1977, the company was permanently enjoined from further violations of the disclosure provisions of the Federal securities laws.[3]
4. Hasbro Industries, Inc.	do	1971-75	23,000	Not recorded on company's books.	At least 1 officer knew of and received rebate payment.	Money used to defray business expenses.
5. Ideal Toy Corp.	Form 8-K resulting from preliminary investigation of audit committee.	N/D	20,000	do	Certain members of management were involved, including receipt of approximately $5,000 by a corporate officer and dispensed on corporate matters.	Money turned over in full to an independent and unaffiliated foreign firm with the understanding that it would be utilized in the Far East to assure continuity of delivery of goods manufactured there for company. Company may also have received unspecified noncash considerations from the carrier.

6. International Seaway Trading Corp.	Form 8–K	N/D	55,296	$24,365 was not recorded in company's books. $26,958 check was returned to carrier uncashed.	Certain officers and directors knew of and participated in payments.	
7. Jason/Empire, Inc	Form 8–K resulting from internal investigation of audit committee.	Feb. 1, 1972–Jan. 31, 1977.	169,149	All payments received were recorded on corporate books.	Several officers (1 of whom was a director) and employees knew of the payments.	Approximately $150,000 of total from ocean carriers, remainder from air carriers.
8. Liggett Group, Inc	8–K based on internal investigation.	N/D	70,000	Recorded in company's books.	Neither officers nor directors were aware of payments.	
9. Mego International, Inc.	Form 8–K reflecting payments received by Hong Kong based subsidiary.	N/D	215,000	Recorded as income of subsidiary company.	Some officers and directors were aware of payments.	Federal Maritime Commission has alleged that a former officer of subsidiary company received cash payments of about $20,000 in 1972–73.
10. Melville Corp	Form 8–K resulting from internal investigation by audit committee.	Jan. 1, 1972–Jan. 1, 1977.	130,000	Recorded as "merchandise allowances".	1 director was aware of the receipt of these payments.	Money applied to a reduction of cost of sales.
11. Milton Bradley Co	Form 8–K resulting from internal investigation of audit committee.	January 1971–December 1976.	6,500	Recorded on the company books as refunds.	Management knew of the rebates.	
12. National Recreation Products, Inc.	Form 8–K resulting from internal investigation by audit committee.	Jan. 1, 1972–Dec. 31, 1976.	51,756	$41,756 recorded in company's books $10,000 not recorded.	Neither officers nor directors were aware of payments.	Rebates received by subsidiary.
13. Pat Fashions Industries, Inc.	Form 10–K annual report	Apr. 1, 1972–Nov. 30, 1976.	82,000	Not recorded in company's books.	Management was aware of rebates.	Money used for corporate purposes.
14. Sony [4]						
15. Spiegel	Form 8–K resulting from committee investigation.	Jan. 1, 1971–Dec. 31, 1976.	127,558	Recorded on company's books.	N/D	Money used to offset freight expense.
16. Stanley Home Products, Inc.	Form 8–K resulting from an internal investigation.	January 1971–April 1976.	325,000	Maintained in off books accounts.	Some officers and directors knew of payments and irregular entries in subsidiaries books.	
17. Superscope, Inc	Form 8–K	June 1972–August 1973. June 1974–August 1976.	121,536 9,374	Most was credited to "freight account" $14,480 shown as "miscellaneous" income on subsidiary's books.	Some directors knew rebates were being received.	
18. Tandy Corp	do	1970–76	850,000	$820,000 recorded on companies books as income $30,000 not recorded.	No knowledge on part of officers and directors of corporation.	97 percent of payments received were from foreign carriers and were listed by subsidiaries as booking commissions.
19. Tenna Corp	do	N/D	235,000	Kept in personal account of director.	1 director personally received bonds as a rebate payment.	Use of stipulated weights and volumes resulted in the underpayment of some freight charges.
20. Warnaco, Inc	Form 8–K resulting from internal investigation by audit committee.	5 yr prior to 1975	400,000	N/D	No involvement with officers or directors.	
21. Western Auto Supply Co.	Form 8–K resulting from internal investigation.	Jan. 1, 1971–December 1976.	264,498	All rebates were recorded in company's books.	Officers and directors were not generally aware that rebates were being received by subsidiaries.	1 subsidiary also received freight charge reductions in the form of understated weights and "prepaid" freight bills whereby freight services were rendered but not billed.

Company	Form of disclosure	Period covered	Amount of rebates disclosed	Accounting treatment	Knowledge of top management	Disposition of rebates and other relevant information
CARRIERS						
22. R. J. Reynolds (Sea Land Services, Inc.).	Form 8-K resulting from an internal investigation by audit committee.	1971-75	>19,000,000	Rebates paid from "off books" accounts and some mislabeling of accounts was involved.	Rebating not generally known to top management until 1975 when corrective action was initiated.	Payments generally in cash or by check and listed as commissions or brokerage.
23. Seatrain Lines, Inc	Forms 8-K and 10-Q	N/D	N/D	Rebates paid from "off books" accounts and inaccurate recording in books and records was involved.	N/D	Preferential treatment also provided some shippers.
24. Walter Kidde & Co., Inc. (United States Lines).	Form 8-K resulting from internal investigation by audit committee.	1969-73 1973-74	1,581,738 377,000	Rebates paid from off book bank accounts.	Some members of top management knew of and approved the use of the off book accounts.	$400,000 to $600,000 noncash rebates granted in the form of misuse of correctors, crediting sales agents with unearned commissions, short-cubing, short weighting, absorption of demurrage charges and free positioning. In June, 1977 United States Lines, Inc., was permanently enjoined from further violations of the disclosure provisions of the federal securities laws.[5]

[1] The information set forth in this table is based on public disclosures by the companies involved. In compiling this chart, the Commission and its staff made no effort to verify the information contained in the public filings. Thus, the Commission's report of this material should in no manner be considered an affirmation of its accuracy or a judgment as to the adequacy of the disclosures under the Federal securities laws.

[2] N/D means that this information has not been publicly disclosed.

[3] Securities and Exchange Commission v. Gamble-Skogmo, Inc. et al. civil action file No. 77-C-3426 (U.S. District Court for the Northern District of Illinois, eastern division).

[4] Information not presently available.

[5] Securities and Exchange Commission v. United States Lines, Inc., civil action No. 77-2746 (U.S. District Court for the Southern District of New York).

Senator INOUYE. Our next witness is the president of Delta Steamship Lines, Inc., Capt. J. W. Clark.

STATEMENT OF ROBERT E. HUNTER, ENGINEER AND CONSULTANT OF DELTA STEAMSHIP LINES; ACCOMPANIED BY EDWARD BAGLEY, NEW ORLEANS, ON BEHALF OF CAPT. J. W. CLARK, PRESIDENT, DELTA STEAMSHIP LINES

Mr. HUNTER. Mr. Chairman, I appreciate it if you will accept me as a pinch-hitter this morning for Captain Clark.

Senator INOUYE. Yes, sir.

Mr. HUNTER. As you know, he was here 2 weeks ago when the hearing was originally scheduled and postponed, and he had to leave for South America the day before yesterday.

I have had the pleasure of appearing before you before, and I would like to identify myself as Robert E. Hunter. I am engineer and consultant for Delta Steamship here in Washington. And I have with me Mr. Edward Bagley, who is from Delta Steamship in New Orleans.

For identification, you will recall, I was Senator Russell Long's administrator for a little bit more than 20 years.

Senator INOUYE. Oh, you are well-known around here, sir.

Mr. HUNTER. Thank you very much.

Senator Long was very much interested, as you know, in this measure and would be here. But unfortunately he is taking care of the energy problem in another part of the building.

Captain Clark is extremely interested, and has made certain—not only did he prepare this statement himself, he initialed every page of it, so that any deviations I make will be strictly a product of the leprechaun.

My name is J. W. Clark. I am president of Delta Steamship Lines, Inc., of New Orleans. I initially wish to express our appreciation and support, in principle, of the objectives sought by Senator Inouye in presenting this bill, S. 2008. The necessity to take effective measures to assure compliance with our shipping laws and regulations by all carriers participating in U.S. foreign commerce is immediate and obvious.

I find it difficult to believe that many major liner operators have engaged in widespread malpractices such as rebating, although I do recognize that U.S.-flag carriers are extremely vulnerable to the actions of some unscrupulous foreign carriers which are beyond the effective reach of our laws. There exists, in practice, a manifestly unfair situation under which U.S. lines are subject to strict controls which cannot be practicably applied to their foreign counterparts.

Referring to the proposed discovery provisions and the requirement that foreign carriers produce documents, records, and other information on the request of the FMC, the bill deals with a very real and wholly inequitable problem in our foreign commerce. This, of course, is due to the fact that U.S.-flag carriers can be subjected to full production requirements while foreign-flag lines, for all practical purposes, are substantially exempted.

As Senator Inouye has recognized, this precludes anything in the manner of evenhanded regulation by the FMC and often makes our

regulatory activities the laughingstock of the international shipping community. It is an inequity which must be corrected but, frankly, I do not believe that S. 2008 will accomplish this unless the bill is modified.

As has been demonstrated in the past, when attempts are made to impose document or other informational production requirements on foreign-flag lines, they can seek shelter by urging their respective governments to issue decrees or resolutions which serve to prohibit the production of their records abroad. The resulting stalemate effectively shields an offending foreign-flag operator. A nation-to-nation confrontation becomes so difficult that, at best, some form of belated, token, and meaningless production is effected. No purpose is served and the United States loses the good will of its trading partners, as well as considerable loss of face for its futile efforts. Obviously, the authority of the FMC must be strengthened.

This being the problem, I submit that the proposed closing of our ports to carriers failing to provide documents or other information requested will only magnify and escalate unfortunate and nonproductive confrontations between our country and its trading partners.

In addition to this, we must anticipate that massive retaliation in kind would ensue. The United States has no monopoly on the regulation of international commerce: our trading partners have an abundance of laws and regulations on their side. We simply cannot export our stringent antitrust philosophy without reprisal. This aspect unquestionably influenced the conclusions and recommendations of the Alexander committee report, preliminary to the enactment of the 1916 Shipping Act.

In short, it is my view that the port closure suggestion is something in the nature of a rusty blunderbuss which, if fired, is as likely to cause damage at one end as at the other. It is essential that we avoid the prospect of such backfire which would injure both U.S. merchants and carriers.

A further problem which I must, at least, mention in passing is simply that there never will be any assurance that any documents or other information produced from abroad will be accurate. This is the simple result of the cold, practical fact that unless the individual attesting to the accuracy of the documents or information is subject to prosecution for perjury, he is not subjected to the ultimate compulsive device which serves to guarantee the accuracy of his responses. This is a problem which lacks a solution; I do not believe I am being unduly cynical in stating that it is a reality which is not going to change.

If any parties abroad are going to violate the law initially by granting rebates, they certainly will have no compunctions about extending their dishonesty one step further and furnishing perjured affidavits with the knowledge that they can never be prosecuted since they will not be subject to the jurisdiction of our courts and justice system.

An alternative which I woud like to suggest, which avoids the threat of nation-to-nation confrontations which the closing of our ports would provoke, is a procedure under which we might effectively regulate, internally, the actions by our own nationals and nonnationals resident in our country and, through them, the carriers they represent.

This is simply to place the primary responsibility of effecting production, complete and accurate, on the U.S. general agents and subagents for foreign-based carriers.

Where production is not timely, or fully responsive, the FMC would be empowered and directed to notify each of the agents of the carriers involved that they were required to cease and desist any further activities in representation of the offending carriers. The cease-and-desist order, if violated, would then subject the corporate entities, as well as their officers and employees, to substantial civil sanctions.

This should not involve any government-to-government confrontations. It would be a matter of enforcing regulation of our statutes through our own residents, citizens, and noncitizens, and precluding them from continuing in the representation of foreign carriers which either will not or cannot comply with our laws. Control of international shipping through regulation of port agents is not unique. Several nations have already established government-controlled ship agency companies which, by requirement of law, are utilized by all carriers calling at their ports, including U.S. liner companies.

Since even this practice apparently has been accepted by the international shipping community, there should be no valid reason why a reasonable control of domestic agents—in the manner proposed here—should be unduly objectionable to foreign carriers or to their governments.

Appended hereto as exhibit A, is a suggested redraft for section 2(c)(2)(A) of the bill which would accomplish these purposes. And these have been filed with you, Mr. Chairman. I don't think it is necessary to read them to you at this time.

It is obvious that if foreign-flag agents are confronted with loss of representation here, they will do their utmost to convince their principals of the wisdom and desirability of effective compliance.

Section 1 of the Shipping Act, 1916, definitions, possibly should be broadened to clearly include foreign-flag agents, shippers, consignors, consignees, and their officers, employees, and agents as persons subject to the act. The penalties provided for offending carriers should be equally applicable to all offenders. It "takes two to tango." It follows that other related sections of the act should be appropriately amended.

Referring now, Mr. Chairman, to the amnesty provisions of the bill, I regret that I must oppose these in the strongest possible terms.

Human nature being what it is, there will always be certain interests whose compliance with law will only be obtained by compulsion. Where the applications of personal, individual—as well as corporate—civil and/or criminal sanctions do not exist, the law will remain a meaningless exercise and its violation will be measured only by the ingenuity of those who seek to obtain the material advantages which their dishonesty produces. I am only stating my pragmatic conviction.

If, on the first substantial disclosure of such malpractices in any meaningful manner, it is concluded that amnesty is to be given to the violators, the effect will be to have eradicated the sanctions from the statutes. Obviously, any prospective violator will look to the precedent and could reasonably anticipate that, if caught, there would be a very real probability that it would receive amnesty and go unpunished for its law-breaking activities. This will tend to negate any other efforts

which are made by the Congress and/or the FMC to attempt to obtain adherence to our laws.

There have been a number of statements attributed to the representatives of a major U.S.-flag line, after admitting its own guilt in committing long-term rebating practices, to the effect that it rebated because almost every one does it, in an apparent attempt to rationalize its own illegal acts.

This unethical and inaccurate tactic has unquestionably damaged the good reputation of the American merchant marine; that is, guilt by association. Such statements are nothing more nor less than shotgun smear tactics which are detrimental to all carriers and should be condemned in the strongest terms possible. Additionally, such statements are wholly destructive of any efforts which may be made to obtain compliance with our laws.

I would like to state to this committee, here and now, that Delta Steamship Lines, Inc., to the best of my knowledge and belief, has not, does not and will not engage in rebating. I believe that the same thing can be said for most of the responsible major United States and foreign flag carriers.

I am convinced that the vast majority of carriers do not engage in rebating. Responsible carriers, United States and foreign both, do abide by the law and, I believe, constitute a majority of the carriers engaged in our foreign commerce.

All of this, in my view, only serves to reemphasize the negative effect which the amnesty provision of the bill would have on adherence to our laws in the future. Obviously, if honest and dishonest carriers are to be treated, in substance, on an equal basis, there is little, if anything, to compel or even recommend honesty in the future. If amnesty is granted once, it will be anticipated, despite any avowals which this committee may make, as a probable course for the future.

Despite the publicity received by the rebating practices of a major U.S.-flag carrier, I cannot believe that its admitted transgressions are typical of the majority of U.S-flag carriers. Where rebating is a practice, the honest carriers suffer through loss of business to the rebater since they cannot remain fully competitive. I hope that this committee will recognize these facts and strike from the bill, in their entirety, all amnesty provisions. If it does not, it will disadvantage—severely—the carriers who operate in an above-board and law-abiding manner.

Unfortunately, the settlement agreement recently worked out by a rebating carrier with the FMC did not contain—as I believe it should have—any positive requirement that the carrier proceed by suit to recover the rebates from all parties to whom they were paid. This, of course, would have removed, to the extent possible, any advantages obtained through the rebates and would have placed the rebater on an equal footing with its competitors.

Even without a specific requirement of such action in the FMC settlement agreement, it is my view, and probably was that of the FMC, that the guilty carrier—as a matter of law—is obliged to take legal action—promptly and before time bars run—to recover the unlawful payments. If this has been done, it has not come to my attention, and I would be quite surprised to find that I am so uninformed as to be unaware of litigation of this magnitude in our industry.

On the contrary, from what I have been able to observe, the carrier in question is diligently pursuing a goal of preserving to the fullest extent possible all competitive advantages which it has gained, using wholly deplorable smear tactics to justify past illegal actions.

Delta Steamship has filed suit in New Orleans to obtain the records reflecting the rebates paid by such a carrier in the trades in which it is in direct competition with Delta. You will understand that this is not idle curiousity on our part, but a need to develop and evaluate the competitive harm which has been done to us in order that we may adequately defend ourselves in the future and adopt such corrective measures as are possible and necessary.

The carrier in question has taken the quite remarkable position—in this Delta suit—that the records on its rebates are "trade secrets" and "private and confidential commercial and financial information." In short, it is apparently endeavoring to preserve, under those guises, the unlawful competitive advantage which it has obtained over Delta.

I do not wish to appear vindictive in any manner but, in the light of this continuing "coverup," I cannot conceive that this committee would protect any line, its officers or representatives guilty of such actions, by granting amnesty in any form.

Before closing my testimony, I would like to recommend to this committee consideration of: (*a*) Amending the Shipping Act of 1916 in such a manner as to strengthen the authority of the FMC to approve equal access, pooling and rationalization agreements. Such agreements have worked effectively to eliminate, or at least minimize, malpractices in the Latin American trades.

Provision should be made for expeditious consideration of all such agreements to avoid costly and frustrating delays, with interim approval during any hearing processes. This would not be discriminatory, and would equally apply to agreements applicable to all our essential trade routes.

Recent reviews, including one conducted by the Department of State, conclusively demonstrate that, in trades where such carrier agreements exists, freight rate increases have been held substantially below the level ofother trades, and a greater degree of rate and service stability has resulted.

(*b*) Consideration must be given to prompt enactment of legislation to blunt the steady encroachment of predatory state-owned/controlled shipping cross trading on our essential U.S. foreign trade routes. Unless soon checked, this sinister, politically motivated intrusion in our foreign commerce will inevitably destroy liner operators engaged in usual commercial services on a private enterprise basis.

I submit that S. 2008, as presently written, does not meet and cannot diminish the very real threat of Communist bloc shipping to our U.S.-flag shipping industry, a threat which could result in the domination of our essential trade routes by predatory alien shipping to the detriment of our entire foreign commerce.

In closing, I would like to emphasize that these recommendations, compliance with discovery through regulation of domestic agents and encouragement of equal access, pooling and rationalization agreements and effective controls for predatory state-owned foreign flag shipping, would provide effective solutions to critical problems confronting our

U.S. maritime industry. Since malpractices, including rebating, and elimination of predatory rate cutting, are commercial problems, the most effective cure lies in authorizing and encouraging to the maximum extent, commercial practices which will make such activities wholly unattractive to those who would circumvent our laws and policies.

Mr. Chairman, Captain Clark says he will be very happy to come back a ssoon as he gets back in the country to answer any questions that his statement may have.

But in the meantime we have Mr. Bagley here for any questions you would care to ask.

Senator INOUYE. Thank you very much.

Starting with page 10 here, I am certain you are aware that this subcommittee and the chairman of the subcommittee have on three occasions now, introduced the so-called third-flag bill with an obvious intent to stop predatory practices such as those practiced by the Baltic Steamship Co. and Far East Steamship Co.

This bill was not intended to do that. S. 2008 is just a 3-year bill that will provide some mechanism for FMC to come forth with a solution for this. This is not the final solution.

Are you suggesting that this measure provide a coverup for, let's see—do you believe that this bill is intended to "protect"—let's name the company you are talking about, Sea-Land?

Mr. HUNTER. Yes, sir.

Senator INOUYE. Why talk about a rebating company. Is this bill intended to protect Sea-Land?

Mr. HUNTER. I am going to let Mr. Bagley answer that, Mr. Chairman. He has discussed it in great detail with Captain Clark.

Mr. BAGLEY. Senator Inouye, we, in reading the bill, are no more certaian as to the effect that it would have on the Sea-Land settlement with the FMC or any other effect on Sea Land than I believe the FMC counsel was in his presentation to you this morning. We are concerned.

Senator INOUYE. I thought the counsel was rather clear that this would in no way affect the agreement reached with Sea-Land and SEC had indicated that no agreement was made, no offer of immunity was made, and none was asked.

Mr. BAGLEY. I think counsel for the FMC, as I heard him sir, I may not have heard him accurately—I think he indicated that he regarded the bill as something that would have to be considered under the settlement agreement in connection with the penalties imposed on Sea Land.

I think the settlement agreement contains a provision to the effect that if there is any change in the law, this will be brought to the attention of the Commission and will be considered by it.

Senator INOUYE. Well, doesn't that company have a right to petition with or without this law?

Mr. BAGLEY. Well, I think they have already exhausted their right to petition, by effecting a settlement, I would think, sir, so far as the settlement is concerned.

Senator INOUYE. Now didn't the counsel say that noting the legislative record and the intent of this bill, that the passage of this measure cannot be used as a reason for petition, granting of petition?

Mr. BAGLEY. That may have been the context in which the presentation was made, sir. I did not understand it in precisely that manner.

Senator INOUYE. Now you have suggested as an alternative, that we deal with the agents.

Mr. BAGLEY. This is correct, sir. To regulate domestically rather than to attempt to get into a nation-to-nation confrontation.

Senator INOUYE. The present law, as you are well aware, provides this vehicle. The FMC has a right to go through any person.

Mr. BAGLEY. Yes, sir, but this would—the FMC does not have cease-and-desist powers in general. This particular suggestion would give a specific cease-and-desist authority to the FMC. They would serve the requirement of production on the agent. If the line, the principal or the agent, did not comply, the FMC would then be in a position to issue a cease-and-desist order requiring the agent to cease representing the principal until the principal had cleared itself of its failure to comply with the document or the production request.

Senator INOUYE. But you do agree that at the present time FMC does have jurisdiction?

The FMC has issued subpenas to agents.

Mr. BAGLEY. Oh, yes, sir, there is no question about issuing a subpena to the agent. But we are not really talking about a subpena to the agent as such. We are talking about a subpena to the line, with notice of the subpena to be served to the agent.

If the line does not—or carrier itself does not comply, with its records, including its records abroad which are not in possession of the agent, a cease-and-desist order is served on the agent ordering it to cease serving the line.

The result would be that the line would no longer have representation for solicitation and other purposes in this country.

We believe that it is very likely that you would never find a cease-and-desist order issued, because the carriers abroad would recognize their obligation and move to get the documents and other discovery productions to this country before such a cease-and-desist order was entered by the FMC.

Senator INOUYE. And you believe that as a result of that these foreign companies, which are sometimes owned by foreign countries, would respond?

Mr. BAGLEY. I think they would have a very strong impetus to respond, Senator. If they did not respond, and if they did not have domestic agents soliciting cargo for them in this country, they would have very little cargo to carry.

Senator INOUYE. We have had discussions, according to the State Department, extending over a period of 15 years now, intergovernmental consultations, urging these countries to be a bit more cooperative.

Mr. BAGLEY. But this is urging the Government to be cooperative, sir.

We are saying to our domestic agents, you won't represent them. They can still call at the ports, we are not closing the ports to them. But when they get there, they certainly will not find the cargo that they are accustomed to finding for their carriers.

Senator INOUYE. And so you suggest that the countries would not retaliate on that basis?

Mr. BAGLEY. I think that retaliation in the sense that, unless we comply with the laws of governments abroad, we will be denied representation in the countries abroad, is perfectly proper.

I don't think it would be of concern to any U.S. steamship carrier.

Senator INOUYE. I am talking about foreign countries retaliating.

Mr. BAGLEY. In the foreign country I don't think there would be any problem if a foreign country retaliated by imposing the same conditions on us as we seek to place on other carriers here—in other words, if you are going to be represented in this country by domestic agents, we expect you to comply with our laws. If that retaliation were imposed on U.S.-flag carriers, I don't think it would be a problem at all, sir.

I don't think that our carriers fail to comply with the laws abroad.

Senator INOUYE. Well, if you issue a cease-and-desist order on the agent to stop representing this company, the practical effect is to close the port, isn't it?

Mr. BAGLEY. It doesn't actually close the port in a government-to-government relationship as such.

It diminishes to the point of it being impractical for the line to continue to operate, the feasibility of obtaining cargo.

Senator INOUYE. So that ship cannot do business here?

Mr. BAGLEY. It cannot, as a practical matter, do business here. This is correct, sir.

Senator INOUYE. And you don't suppose that the government that owns that ship would complain about this and close their ports?

Mr. BAGLEY. I don't think that you have the same government-to-government confrontation, Senator. I think that this does avoid it.

I think that this is something that our State Department would be able to say, "We are not closing ports, we are simply regulating our domestic personnel." And where a company cannot or will not comply with our laws, we say that "you cannot have domestic representation in our country."

Senator INOUYE. You have indicated that some countries have government agencies serving as agents.

Mr. BAGLEY. Yes, sir.

Senator INOUYE. Would you suggest that we have a Government agency serving as agents to foreign countries?

Mr. BAGLEY. No, sir. We certainly would not.

Senator INOUYE. Why not?

If they can do it, can't we do it?

Mr. BAGLEY. Generally from the shipping end of the thing, Senator, I really don't think that the Government does well in private enterprise, in handling this type of agency operations.

Senator INOUYE. I thought you said that you people do not object to this type of activity.

Mr. BAGLEY. I'm sorry, sir?

Senator INOUYE. The statement says here——

Mr. BAGLEY. Well, it is accepted by the international shipping community, because in many countries there are conditions imposed on doing business, which we in this country would not consider to be

proper conditions on our doing business in this country, or to impose on others doing business in this country.

It is a fact of life in some of the nations abroad.

Senator INOUYE. This fact of life, can't tit for tat be proper?

Mr. BAGLEY. It may be proper. It would not be something that I, personally, would like to see.

Senator INOUYE. Well, if you are going to let the marketplace play the role in determining rates, et cetera, then we shouldn't be too concerned about what the Communist bloc nations are doing.

Mr. BAGLEY. Senator, I think we have to let the marketplace determine to a large extent what the rates are.

Now these are many ways in which the marketplace can determine, and many ways in which the marketplace does determine the rates, including, as I am sure you are aware, the use of shipper's councils in some trades, where you have an open negotiation between carriers and shippers. This is marketplace determination. And it does not get to something like the adoption of the ways of the Communist bloc countres and their tactics in our trades.

Senator INOUYE. Do you think the FESCO Steamship Co. and the Baltic Steamship Co. would respond if their agents of the United States were served with this cease-and-desist order?

Mr. BAGLEY. I would assume that some response would be made. I think this is true.

I think the need to maintain domestic agents is such that there would be a necessity to do that, to make some sort of production to comply with the law.

Senator INOUYE. And you seriously believe that the Government in Moscow will tell their subagency to comply with the law?

Mr. BAGLEY. I would still hope that there would be a compliance in some form, because of the need and the desirability of maintaining a domestic agent.

Senator INOUYE. Well, as you indicated, compliance in some form might be just a little piece of paper saying, I object to all of this.

Mr. BAGLEY. No; I think it would be something more substantial than that.

One thing that Captain Clark has pointed out in this testimony, and it is a matter of real concern to him and to us, is that where you do not have an actual threat of prosecution for perjury against the person making the production, you do not really have the ultimate guarantee of accuracy in the document or response being given to you.

Now this is a fact of life that we offer no solution for. It simply is there.

And if the representative in FESCO or Baltic Shipping Co. wants to prepare a document that is not entirely accurate and send it to this country to be produced as the accurate production, to use that as an example, there obviously would be no ultimate compulsion available against such an individual to insure the truthfulness of the statement.

Senator INOUYE. You seem to disagree with the statement made by the General Counsel of SEC in which he said that he believed this type of activity is widespread in the industry.

Mr. BAGLEY. Senator, the views are those of Captain Clark based on substantial experience in a number of trades.

Senator INOUYE. I am not suggesting that your company is——

Mr. BAGLEY. I understand.

Actually, I am an attorney, sir. And so I am at something of a disadvantage in responding to this. As I tell you, these are Captain Clark's views based on his experience in the trades in which he deals, and the feeling that malpractices are not widespread to the extent that they are suggested to be in existence at this time.

Senator INOUYE. Well SEC said that they have got 400 major corporations now.

Mr. BAGLEY. Well these were major corporations across the whole board, all industries. This of course was not——

Senator INOUYE. They just started the investigation on malpractices since 1976 according to the record.

Mr. BAGLEY. I believe that is correct, sir.

Senator INOUYE. And in about a year's time they have concluded that it is really widespread. And according to the FMC in testimony last March, they indicated that it exceeds $100 million, and the thing is just the tip of an iceberg.

Mr BAGLEY. Well, I think what you are talking about is correct, sir, that the malpractices that you find in this country in our U.S.-flag carriers, do represent the tip of the iceberg, because quite obviously we are not getting the same production—as you have pointed out already this morning—from the foreign-flag carriers.

Senator INOUYE. Well, we appreciate your coming forth today, and submitting your recommendations, sir. We will study them very carefully, and this exhibit A will also be made part of the record.

Mr. BAGLEY. Thank you, sir.

Senator INOUYE. If we may, we would like to submit to you a few questions [1] for your consideration and response, sir.

Mr. HUNTER. Thank you, Mr. Chairman, we appreciate and desire to work with your committee in any way we can.

We all realize the problems you have. Captain Clark's views, as he tried to express them, he would like to lean toward solving the problem more competitively than punitively, if that is possible.

Thank you very much, sir.

Senator INOUYE. Yes, sir.

[The exhibit referred to follows:]

EXHIBIT A

Suggested revision, S. 2008, page 3, line 3, through page 4, line 5.

"(2) In the case of the depositions, written interrogatories, discovery procedure or subpoenas issued in relation to an investigation or hearing held under an order issued by the Commission under subsection (c)(1), notice of such depositions, written interrogatories, discovery procedures or subpoenas shall be directed to all U.S. agents and subagents in the case of any carrier which is not domiciled in and does not have its principal office and place of business in the United States. Failure on the part of any carrier thus served to comply fully and within the time fixed by the Federal Maritime Commission, with such depositions, written interrogatories, discovery procedures or subpoenas, shall:

((A) Toll the time within which the Commission shall issue a final order as provided in subsection (c)(1). The Commission shall further notify each of the agents and subagents of such carrier that they are required by order of the Commission, to cease and desist from representing or acting for, in any manner..

[1] See p. 180.

such carrier from and after the date of receipt by them of such cease and desist order. Such order shall apply to all persons, firms and corporations comprising or acting in concert with the named agents and subagents of such carrier. The cease and desist order shall remain in effect as to all such persons together with all other persons thereafter served with such order, including any agents or subagents thereafter nominated by such carrier, until such carrier has fully responded to the depositions, written interrogatories, discovery procedures or subpoenas invoved, and the Commission has issued its order in the proceeding. Any agent or subagent or any person, firm or corporation comprising or acting in concert with any such agent or subagent which shall violate this section of this chapter by failing to comply with such cease and desist order shall be liable to a civil penalty of not less than $25,000.00 and not more than $50,000.00 for each day such violation continues."

Senator INOUYE. Our next witness represents the law firm of Wender, Murase, & White, representing Mr. Takashi Miura, director and general manager in New York of Nippon Yusen Kaisha, Ltd. Mr. Jiro Murase, welcome, sir.

STATEMENT OF JIRO MURASE, COUNSEL, ON BEHALF OF TAKASHI MIURA, DIRECTOR AND GENERAL MANAGER IN NEW YORK OF NIPPON YUSEN KAISHA, LTD.; ACCOMPANIED BY JONATHON MOORE

Mr. MURASE. Thank you.

Senator INOUYE. Would you care to indentify your colleague before proceeding?

Mr. MURASE. Yes, Mr. Chairman. I am accompanied by Mr. Jonathon Moore of our Washington office.

Mr. Chairman, committee counsel, my name is Jiro Murase. I am a partner of the law firm of Wender, Murase & White.

Senator INOUYE. Mr. Murase, if you wish, we can put the statement in the record in total.

Mr. MURASE. Fine. Thank you very much.

Senator INOUYE. Without objection, the statement will be made part of the record, and if you wish to summarize this it would be very helpful, sir.

Mr. MURASE. Fine. Thank you. I am pleased and honored to have been invited to appear before your subcommittee. I can only offer you the benefit of my views as a Japanese businessman. I cannot speak for my government or its policies or discuss legal questions. However, I will attempt to be of assistance by offering my understanding of the position of my government and my personal views as a businessman.

As your invitation noted, the historical background of the proposed legislation before this subcommittee goes back at least 15 years. Now, my understanding in this regard, which is supported by the historical record, is that the Japanese Government has consistently opposed other governments attempt to compel Japanese lines to produce documents located outside the territory of the demanding country. In other words, Japan would oppose the United States attempting to require a Japanese line to produce materials located outside the United States.

Senator INOUYE. All right, now may I carry on a discourse as we move along.

I find this very interesting, because not too long ago the Japanese Government, through diplomatic channels, almost compelled this gov-

ernment to compel Lockheed to produce documents and persons to assist the Japanese Government in the investigation of the so-called Lockheed case there.

At that time the Japanese Government wasn't too concerned about our sovereignty rights.

Mr. MURASE. Mr. Chairman, since I am appearing as counsel today, I can only relay your questions to my client for appropriate reply. I duly respect your question, Mr. Chairman. If I'm called as a witness, then I——

Senator INOUYE. No; I'm sorry. I was just looking at this.

Now you have heard the witness just before you suggest that instead of demanding that documents be produced, a cease and desist order be issued upon the agent representing the foreign carrier. And if the malpractice continues, this agent would be prohibited from representing this foreign carrier. What would the Nippon Yusen Kaisha say about that?

Mr. MURASE. Mr. Chairman, may I be permitted to relay that question to my client?

Senator INOUYE. Yes, sir, please proceed.

Mr. MURASE. It is also my understanding that this opposition rests upon the Japanese Government's view of its sovereignty. And, I believe its view concerning the matter of sovereignty is sepecially strong in a field vital to Japan and subject to special regulation by its government. I also understand that my government's position is based on its view of the fundamental principles of international law, custom, and practice.

I am aware that the views of my government have been made known in numerous communications. I have located some of these communications. For the convenience of your subcommittee, I have attached copies to my statement. I believe the contents of those statements will indicate the degree of concern my government has in this area.

As a businessman, I do not feel in a position to judge the legal issues involved. But from my experience in trade between the United States and Japan, I can emphasize to you the grave predicaments that can be caused by a conflict of views between two governments.

Let me take an example from my own industry. Some years ago the FMC ordered Mitsui Steamship Co. to produce documents in Mitsui's possession. However, the Japanese Ministry of Transport ordered Mitsui not to give up any documents it held outside the United States. Mitsui had no choice but to obey its own government's order. This is because various sanctions would result from failure of a Japanese line to comply with an order of its national sovereign.

The regulatory authority of the ministry of transport, as well as other agencies of the Government of Japan, is established by numerous laws and regulations. Those agencies have the power, particularly in a regulated field such as shipping, to control a wide range of activities, and violation of an order can result in consequences which would seriously impede operation of the affected enterprise.

If S. 2008 were to become law, and Mitsui—or NYK line—at the Japanese Government's command were forced to violate S. 2008, they would be frozen out of U.S. ports. In other words, Japanese lines would be in an impossible position.

Senator INOUYE. May I ask a question at this point. I believe you can answer this.

As a lawyer—do you believe the use of our ports is a right or privilege? Is it the right of the Japanese Government to have use of American ports, or is it the privilege granted by this Government to the Japanese Government?

Mr. MURASE. I believe it is a reciprocal right provided under treaty.

Senator INOUYE. Subject to the laws.

Now I notice that the Japanese Government has placed all sorts of restrictions upon American trade in Japan, and they have made it known, very clear, that doing business there is a privilege that is granted us. I am certain you are aware of that. But, please proceed, sir. Do you think it would be unreasonable on the part of the United States if we said that ships without double hulls may not enter our ports? Or, ships that fail to maintain certain safety requirements on board may not enter our ports?

Would you consider this type of regulation as being unreasonable?

Mr. MURASE. Speaking as an individual, not in the capacity of counsel for NYK, I think restrictions of a reasonable nature each sovereign nation can impose, but every right of a sovereign nation is also subject to a reciprocal right based on mutual accommodation. Because if we are to continue to cooperate and make this world a place in which we can live, mutual accommodations are, I believe, necessary.

Senator INOUYE. I am not aware of the *Mitsui case*. I haven't studied the *Mitsui case*. But suppose if the Mitsui Steamship Co. was, in fact, involved in malpractices; and suppose the only way that the FMC could carry out the policy of the United States to wit, suppressing malpractices was to get documents from Mitsui, and further suppose the Japanese Government, exercising its sovereignty, refused to permit Mitsui to release those documents. Do you think it is fair to the American carriers who are compelled to produce documents in such cases, to excuse the Japanese? That is, not put them under the same compulsion?

Mr. MURASE. Mr. Chairman, if I may be permitted to refer to Mr. Miura's statement, he is suggesting that the matter be handled on bilateral or multinational bases, and he is saying in fact, it is my understanding, that representatives of our two governments have had and are continuing to have discussions concerning maritime matters in which they both have a vital interest.

It is also my understanding that Japan's Ministry of Transport is confident and has so indicated to the U.S. Government that it can effectively police its national flagship lines.

We would, of course, be confident that the FMC can police U.S.-flag lines.

Then this would leave for further discussion the policing of third-country flag lines engaged in United States-Japan trade.

And, again, speaking as an individual, not as a counsel for NYK, I believe the problem back in 1963 was exactly that. That even if Japan were able to police its own flag lines, it could not police third-country flag lines, and, therefore, as your previous discussions have clearly indicated, only third-country flaglines would benefit.

And it is my belief that at that time the Ministry of Transport felt that in order to protect its own national lines, as the chairman and

the FMC are entitled to protect the U.S. national interest, certain actions had to be taken.

Senator INOUYE. What actions were they?

Mr. MURASE. To prohibit production of documents so that their national lines would not be unduly penalized while third-country flag lines would go free.

Senator INOUYE. Are the laws of Japan very strict on malpractices in the foreign trade?

Do you have antirebating laws?

Mr. MURASE. Well, again, I am not expert in that field, Mr. Chairman.

My personal belief is that the Japanese Government and the Japanese business has been about par with U.S. business in policing its own activities.

Senator INOUYE. Please proceed.

Mr. MURASE. Thank you.

As a businessman, I am pleased and proud that our two great nations have such a deep and vital relationship, and have had such great success in working together. I feel the governments of both countries are fully capable of resolving matters in the maritime area. As you know, our two governments are working together on bilateral and multinational bases to develop solutions to a number of important and complex problems. It is my belief that the matter before the subcommittee should be approached on the same basis.

In summary, cooperation and mutual accommodation between the United States and Japan, and in fact among all nations, is essential at this stage for the security, well-being and future stability of the ever-shrinking and interdependent world we live in. In the deepest belief that our two great nations should and can successfully cooperate in order to resolve these matters, I respectfully urge that S. 2008 not be adopted in its present form.

Mr. Chairman and committee counsel, I appreciate your invitation. You have honored me by your consideration, and I thank you very much.

Senator INOUYE. All right, thank you very much, Mr. Murase.

I know that you have been sitting in the committee room while the witnesses were presenting their statements this morning. I hope you are convinced that this committee is very serious about this effort to stamp out malpractice in our foreign trade.

You have studied our measure. If you wish to make suggestions as to how it could do this without unduly injuring our relationship with other countries, I would invite you to submit your suggestions.

Mr. MURASE. Fine.

Thank you very much Mr. Chairman and committee counsel.

Senator INOUYE. I thank you very much for coming here all the way from New York to assist us this morning, and having to wait all these hours.

Mr. MURASE. Thank you very much.

Senator INOUYE. And will you convey our gratitude to Mr. Miura, please?

Mr. MURASE. Fine.

Thank you, sir.

Senator INOUYE. Thank you.
[The statement follows:]

STATEMENT OF TAKASHI MIURA, GENERAL MANAGER, NIPPON YUSEN KAISHA, LTD., NEW YORK OFFICE

Mr. Chairman and members of the subcommittee. My name is Takashi Miura. I am a Director, and the General Manager in New York, of Nippon Yusen Kaisha, Ltd., or as we are usually called, NYK Line.

I am pleased and honored to have been invited to appear before your Subcommittee. Your invitation was received on September 19th, and I have had very little time to prepare. Also, I can offer you only the benefit of my views as a Japanese businessman. I cannot speak for my government or its policies or discuss legal questions. However, I will attempt to be of assistance by offering my understanding of the position of my government and my personal views as a businessman.

As your invitation noted, the historical background of the proposed legislation before this Subcommittee goes back at least 15 years. Now, my understanding in this regard, which is supported by the historical record, is that the Japanese government has consistently opposed other governments' attempts to compel Japanese lines to produce documents located outside the territory of the demanding country. In other words, Japan would oppose the United States attempting to require a Japanese line to produce materials located outside the United States. And, I understand this is precisely what S. 2008 would require.

It is also my understanding that this opposition rests upon the Japanese government's view of its sovereignty. And, I believe its view concerning the matter of sovereignty is especially strong in a field vital to Japan and subject to special regulation by its government. I also understand that my government's position is based on its view of the fundamental principles of international law, custom and practice.

I am aware that the views of my government have been made known in numerous communications. Since September 19th, when I received your invitation, I have located some of these communications. For the convenience of your Subcommittee, I have attached copies to my statement. I believe the contents of those communications, and others which I might be able to locate with additional time, will indicate the degree of concern my government has in this area.

As a businessman, I do not feel in a position to judge the legal issues involved. But, from my experience in trade between the United States and Japan, I can emphasize to you the grave predicaments that can be caused by a conflict of views between two governments.

Let me take an example from my own industry. Some years ago the Federal Maritime Commission ordered Mitsui Steamship Company to produce documents in Mitsui's possession. However, the Japanese Ministry of Transport ordered Mitsui not to give up any documents it held outside the United States. Mitsui had no choice but to obey its own government's order. This is because various sanctions could result from failure of a Japanese line to comply with an order of its national sovereign. The regulatory authority of the Ministry of Transport, as well as other agencies of the Government of Japan, is established by numerous laws and regulations. Those agencies have the power, particularly in a regulated field such as shipping, to control a wide range of activities, and violation or an order can result in consequences which would seriously impede operation of the affected enterprise.

Suppose this happened today. If S. 2008 were to become law, and Mitsui—or NYK Line—at the Japanese government's command were forced to violate S. 2008, they would be frozen out of United States' ports. In other words, Japanese lines would be in an impossible position. And, if we look to history, I would expect ths to happen to the shipping lines of many other great trading nations as well. I respectfully submit that it is unreasonable to be forced to choose between destruction of one's business at home or with one of the world's great trading nations. I earnestly hope, therefore, that this grave dilemma would never arise.

From the standpoint of a businessman, I feel I should offer a few other comments concerning the sanctions in S. 2008. As my earlier remarks may suggest, if S. 2008 becomes law I would expect it to rekindle the serious international

tensions of the past in this special area. Also, those sanctions appear—even to someone who is not a lawyer—to raise serious questions under various international treaties.

Moreover, as a practical matter, the sanctions would strike at the foundation of world trade. Japan, of course, would be especially affected. As I noted earlier, they would seriously impede Japan's shipping activity with the United States. This itself would be a matter of the greatest national importance. But, more fundamentally, the inability of Japanese lines to serve U.S. ports would result in denial of the many American products upon which Japan's natonal livelihood depends. I should also mention the severe impact this would have on U.S. exports. The tonnage of U.S.-Japan and third-country trade carried through U.S. ports by Japanese lines alone will serve to quantify the huge economic losses which would result for both our countries. It is also not difficult to imagine the possibilities of foreign government retaliation to the closing of U.S. ports.

Because of these many, and serious, considerations, I would respectfully suggest as one individual with loyalties to Japan and respect and affection for the United States, that the problems which gave rise to this proposed law can best be handled by bilateral or multinational negotiations, and thereafter by appropriate legislative means. In fact, it is my understanding that representatives of our two governments have had and are continuing to have discussions concerning maritime matters in which they both have a vital interest. It is also my understanding that Japan's Ministry of Transport is confident, and has so indicated to the U.S. government, that it can effectvely police its national flag lines. We would, of course, be confident that the Federal Maritime Commission can police U.S. flag lines. Then, this would leave for further discussion the policing of third-country flag lines engaged in U.S.-Japan trade.

As a busnessman, I am pleased and proud that our two great nations have such a deep and vital relationship, and have had such great success in working together. I feel the governments of both countries are fully capable of resolving matters in the maritime area. As you know, our two governments are working together on bilateral and multilateral bases to develop solutions to a number of important and complex problems, including security, energy, economic development, barriers in world trade, changes in the international monetary situation, which have been of increasing concern in recent years. The matters before this Subcommittee should be approached on the same basis.

In summary, cooperation and mutual accommodation between the United States and Japan, and in fact among all nations, is essential at this stage for the security, well-being and future stability of the ever-shrinking and interdependent world we live in. On the other hand, I would greatly fear the possible impact on the relationship, trade and cooperation with our most important trading partner if the United States were to act unilaterally in this particular area. In the deepest belief that our two great nations should and can successfully cooperate in order to resolve these matters, I respectfully urge that S. 2008 not be adopted in its present form.

Mr. Chairman and members of the Subcommittee, I appreciate your invitation; you have honored me by your consideration, and I thank you very much.

LIST OF ATTACHED COMMUNICATIONS

1. Note of the Embassy of Japan, Washington, D.C., March 7, 1970.
2. Note of the Embassy of Japan, Washington, D.C., August 23, 1960, in Hearings for the Antitrust Subcommittee of the Committee on the Judiciary, House of Rep., 87th Cong., 1st Sess. (March 7, 8, 9, 10, 15 and 16, 1961), Part 3, Vol., I, pp. 686–687.
3. Order of Ministry of Transportation (translation), dated February 25, 1961, relating to production of documents; in Hearings before Subcommittee before the Merchant Marine and Fisheries Subcommittee of the Committee on Commerce, U.S. Senate, 87th Cong., 1st Sess., on H.R. 6775, Part II, (July 17, 20, 26, 28, Aug. 2 and 3, 1961), pp. 190–191.
4. Note of Embassy of Japan, Washington, D.C., March 20, 1961; in Hearings before the Committee on Commerce, U.S. Senate, 87th Cong., 1st Sess., on H.R. 6775, Part. I, (June 16, 1961), p. 60. Also in Hearings before the Special Subcommittee on Steamship Conferences of the Committee on Merchant Marine and Fisheries, House of Rep., 87th Cong., 1st Sess., on H.R. 4299, (March 20, 21, 22, 23, 24, 27, 28, April 10, 26, and 28, 1961), pp. 235–236.

5. Note of the Embassy of Japan, Washington, D.C., June 15, 1961; in Hearings before the Merchant Marine and Fisheries Subcommittee of the Committee on Commerce, U.S. Senate, 87th Cong., 1st Sess., on H.R. 6775, Part II (July 17, 20, 26, 28, Aug. 2 and 3, 1961), pp. 189–190.

6. Order of Japanese Ministry of Transportation (translation), dated March 20, 1962, relating to production of documents.

7. Note of Embassy of Japan, Washington, D.C., September 8, 1967.

EMBASSY OF JAPAN,
Washington, March 7, 1960.

The Ambassador of Japan presents his compliments to The Honorable the Secretary of State and, with reference to the Federal Grand Jury proceedings in the United States Court for the District of Columbia serving for the investigation of shipping industry by the United States Attorney of the Department of Justice of the United States, has the honor to state the views of the Government of Japan in this matter as follows:

The subpoenas issued by the United States District Court purport to require the production of all designated documents in the possession, custody or control of the person named in the subpoena wherever those documents may be located both in and out of the United States.

The Government of Japan considers that the subpoenas purporting to require the Japanese steamship lines to produce documents located in Japan are not in conformity with established principles of international law, because, in the absence of agreement, the actual judicial enforcement of one state may not extend beyond its borders and interfere with the sovereign jurisdiction of another state. Accordingly, it is the view of the Government of Japan that the authority of the subpoenas *duces tecum* served on the Japanese companies does not extend to any documents requested to be produced which might be found within the territorial jurisdiction of Japan.

The Government of Japan respectfully requests that the contents of this note be brought to the attention of the competent authorities for appropriate action.

EMBASSY OF JAPAN,
Washington, August 23, 1960.

The Ambassador of Japan presents his compliments to the Honorable the Secretary of State and under instructions from his Government wishes to draw attention to the Order issued by the Federal Maritime Board on April 11, 1960 under authority of Section 21 of the Shipping Act of 1916 and served upon eleven Japanese shipping companies on April 13, 1960 which purports to require production of a wide range of documents relating to their activities both within and without the United States, and to state the views of the Government of Japan with respect thereto as follows:

(1) The Government of Japan wishes to remind the Department of State of the Memorandum of March 7, 1960, in which it was stated that the subpoenas *duces tecum* issued in connection with the Grand Jury investigation of the shipping industry initiated by the United States Department of Justice purporting to require Japaneses shipping companies to produce documents located in Japan are not in conformity with established principles of international law and that the authority of the said subpoenas does not extend to any documents which might be found within the territorial jurisdiction of Japan. The Government of Japan now reasserts its view stated therein in connection wth the proceedings instituted by the Federal Maritime Board under the aforesaid Order.

(2) The Government of Japan regrets that, notwithstanding the views thus expressed, another comprehensive investigation into the Japanese shipping industry should have been initiated by a regulatory agency of the United States Government. While the Government of Japan considers that the Japanese shipping companies involved will continue to cooperate with reasonable requests of the Federal Maritime Board which are deemed to be properly within the jurisdiction of the United States, it is felt that the instant Order, apparently involving a claim of jurisdiction over and beyond and such limitation, may give rise to conflicts of jurisdiction and maritime policies which would frustrate the international community of interest in the smooth operation of the shipping industry throughout the world including that of the United States.

(3) Moreover, the aforesaid Order appears so broad and sweeping in its terms as to constitute unreasonable searches and seizures devolving a great detriment, inconvenience and loss to the respondent Japanese shipping companies.

(4) Therefore, the Government of Japan requests that the instant Order should be rescinded in accordance with the view set forth herein and that the United States Circuit Court of Appeals for the District of Columbia be apprised of the contents hereof.

FEBRUARY 25, 1961.

Re Federal Maritime Board order of April 16, 1960.

Messrs. SHINNIHON, KISEN, KABUSHIKI, KAISHA:

With reference to the above-mentioned matter, it is requested that your company withhold submission to the Federal Maritime Board of books, documents, and other records located within the territorial jurisdiction of Japan for the reasons stated below.

The order issued by the Federal Maritime Board under date of April 11, 1960, seeks to compel the production of copies of a wide range of reports and various kinds of agreements. With respect to Japan the 11 companies engaged in scheduled sailing making port calls on the United States have been made respondents.

The aforementioned Federal Maritime Board order purports to have been issued under authority of section 21 of the Shipping Act of 1916. However, such attempt on the part of an agency of the U.S. Government to compel the production of documents located within the territorial jurisdiction of Japan, without prior Government consent, constitutes a unilateral attempt to impose the sovereign authority of the United States within the territorial jurisdiction of Japan in clear violation of international law. At the same time, compliance with the Federal Maritime Board order would have the consequence of according de facto recognition to unilateral regulation of Japanese liner service operation in Japanese foreign commerce pursuant to the internal laws of the state having jurisdiction over the port of call. Moreover, there exists a risk that such compliance might not only obstruct the future conduct of our maritime administration, but also seriously our foreign commerce.

Presently, the validity of the aforementioned order is being contested in the courts of the United States. However, as noted above, since this matter involves aspects which impinge upon the international legal question of the sovereign right of a state and those which relate to the administration of maritime transportation by a state, it is believed that this matter must be resolved through diplomatic negotiation between Japan and the United States.

EMBASSY OF JAPAN,
Washington, D.C., March 20, 1961.

The Embassy of Japan presents its compliments to the Department of State and has the honor to draw attention to H.R. 4299 which would amend the Shipping Act, 1916, introduced in the House of Representatives on February 15, 1961, by the Honorable Herbert C. Bonner.

The Embassy wishes to take this opportunity to express the following views of the Japanese Government with regard to the foregoing proposal.

(1) It is the view of the Government of Japan that the principal objective of the conference system lies in the elimination of unrestricted competition among carriers through the offering of adequate and scheduled sailings and the stabilization of rates, thereby contributing to the healthy expansion of trade throughout the world.

It is the further view of the Government of Japan that the dual rate contract proposal is meaningful to the extent that it would serve to promote the foregoing objective of the conference system. However, H.R. 4299 would appear not only to nullify the very purpose of the dual rate contract in that it involves serious limitations on its operation, but it would also result in diminishing the effectiveness of the conference system in providing stabilized liner service.

The Government of Japan is hopeful that cargo carriage between Japan and the United States will be stabilized, and, in particular, it believes that the establishment of an unfettered dual rate contract system consistent with recognized international shipping practices is necessary to the realization of this objective. In this connection, it is noted that in 1958 the Government of Japan amended its Maritime Transportation Law to eliminate various restrictions on conference activities so as to strengthen the self-regulatory function of the conference.

(2) In principle, shipping rates should be freely determined by the shipping lines in the light of relevant factors affecting the trade route involved. Moreover, shipping rates are of equal concern to all countries involved, and for this

reason such rates should not be set unilaterally by any one country based solely on its own commercial policy considerations. H.R. 4299 would appear to make possible the unilateral determination of maximum and minimum rates predicted solely upon the commercial policy considerations of the United States. This provision is without precedent and, in its broader aspects, it might conceivably be employed in an arbitrary manner detrimental to the promotion and expansion of international trade.

(3) The views of the Government of Japan on the Section 21 Orders issued by the Federal Maritime Board requesting various documents located abroad have already been transmitted to the Department of State. The provisions in H.R. 4299 which would require that shipping lines agree to the submission of documents, wherever located, as a condition precedent to the validation of conference agreements, completely disregards the rights of other States which might be affected. This provision, which would involve an attempted exercise of authority by an agency of the United States within the jurisdiction of Japan is in violation of the principles of international law and one which the Government of Japan cannot countenance.

THE EMBASSY OF JAPAN,
Washington, D.C., June 15, 1961.

The Embassy of Japan presents its compliments to the Department of State and has the honor to refer to the aide memoire presented to the State Department on March 20, 1961, stating the views of the Government of Japan on H.R. 4299, which had been introduced into the House of Representatives to amend the U.S. Shipping Act, 1916, as amended.

The Government of Japan has subsequently thereto reviewed H.R. 6775, as it was modified and passed by the House of Representatives on June 12, 1961. The Government of Japan notes with gratification that the new bill introduces certain limited modifications, but certain other provisions which have been added and others retained, on balance, serve to increase the undesirable tenor of the bill. This development is viewed with grave concern by the Government of Japan.

First, the provision which would amend section 14 of the Shipping Act of 1916 authorizing agreements which would provide for lower rates to shippers or consignees who agree to give their patronage to the carriers which are parties to such agreements is so couched with various restrictive conditions that it will only serve to defeat in large part the very purpose of the dual-rate contract system. The condition which would provide that no such agreement may be authorized or continue to be authorized unless it "is not intended, and will not be reasonably likely, to cause the exclusion of any other carrier from the trade," would limit the approval of such contracts to exceptional cases. The provision establishing a reasonable maximum differential between the contract rate and the noncontract rate would, in and of itself, appear more than adequate to prevent unfair competitive elimination of nonconference carriers consistent with the effective operation of the contract rate system.

Second, the provision which would amend section 15 of the Shipping Act to proscribe effective agreements between conferences would be highly undesirable from the standpoint of the primacy of achieving stability in trade routes.

Third, in connection with the proposal to amend section 15 of the Shipping Act, the provision purporting to include a condition that no shipping agreement may be approved unless it contains "provisions that every signatory shall provide records or other information, wherever located, required by any order of the Board," would have the effect of extraterritorially extending the sovereign jurisdiction of one country in infringement of the sovereign jurisdiction of the other country or countries directly concerned with the trade involved in violation of established principles of international law. In addition, the final version would appear to aggravate this risk by requiring that not only conferences, but also all those engaged in any segment of shipping activity must produce documents and information whenever located in response to section 21 order. As emphasized previously on several occasions, the Government of Japan takes this opportunity to reassert its firm opposition to any such provision.

Further, the Government of Japan notes with grave concern the provision in the new bill, which would amend section 15 of the Shipping Act to authorize the Federal Maritime Board to disapprove conference rates under certain circumstances. As stated in the previous aide memoire, it is the view of the

Government of Japan that this provision, if effectuated, would have a seriously deleterious effect on the operation of international shipping. In this connection, it is emphasized again that due regard should be taken of the realities of international shipping wherein any segment thereof and any trade route therein involved are a matter of direct concern to at least two countries and the shipping lines, shippers, and consignees who are nationals, respectively, of such countries, and any attempt on the part of one country to regulate such shipping activity solely on the basis of its internal policy considerations would create a grave risk that stabilization and development of international shipping will be seriously impeded.

Accordingly, the Government of Japan is desirous that the U.S. Government consult with the maritime countries concerned with a view toward enacting legislation which would be in consonance with the stability and sound growth of international shipping, consistent with the mutual interests of all participating maritime countries. For its part, the Government of Japan wishes to take this opportunity to express its intention to respond to any such request for consultation.

MARCH 20, 1962.

Re Section 21 order of the Federal Maritime Commission dated March 5, based upon Shipping Act of 1916 of the United States—Docket No. 918.

From: Minister of Transportation (Seal)
To: President, Mitsui Steampship Co., Ltd.

With reference to the Section 21 Order issued by the Federal Maritime Commission on March 5, 1962, in Docket No. 918, I order you not to comply with the order of the Commission insofar as it relates to the production of documents located outside the United States which might be in the possession of your company, for the following reasons:

The above mentioned Order requests your Company to produce documents held by your Company outside the United States. It is well-established international custom and practice that the U.S. Government, if it desires to obtain documents located outside the United States, must obtain them through the judicial authorities of the foreign country wherein such documents are located. The attempt of the U.S. Government compelling you to produce documents located outside the United States would therefore constitute an act in disregard of this well-established international practice.

The Embassy of Japan presents its compliments to the Department of State and, under instruction from its Government, has the honor to express the serious concern of the Government regarding a treble damage action under U.S. antitrust laws brought by Sabre Shipping Corporation before the United States District Court for the Southern District of New York against the Japan Atlantic and Gulf Freight Conference, the New York Freight Bureau (Hong Kong) and member lines thereof, severally, and Docket No. 1083, a legal proceeding now pending before the Federal Maritime Commission and to state as follows:

These legal proceedings relate to rate reductions carried out during 1962 and 1963 by the conferences and their members engaged in the Japan and Hong Kong-U.S. Atlantic and Gulf Port trades and challenge these actions as violative of the U.S. antitrust laws and/or the Shipping Act of 1916.

Throughout the above-described period, the Government of Japan, gravely concerned with the increasingly disruptive activity of independent carriers, issued a series of directives to the Japanese lines to take all necessary measures against the independent carriers which would restore stability in these trades.

The Government of Japan has traditionally attached high importance to the role of the shipping conferences in promoting trade stability, and these directives were issued to compel the Japanese lines to take effective measures against disruptive actions of independent carriers.

However, if a decision is rendered in the aforementioned proceedings which would foreclose rate reductions by shipping conferences in competing with independent carriers, a threat to the very survival of the shipping conference could arise. In view of this contingency, the Government of Japan believes it necessary to consider measures to forestall instability and disruption in the trade route.

Accordingly, the Government of Japan desires to exchange frank views on an evaluation of the role of shipping conferences in providing regular and dependable carriers service and in promoting trade. In addition, the Government of

foreign steamship company from abroad to appear in Washington at an FMC hearing.

However, if that company should fail to produce that witness voluntarily, we believe that it would be, then, entirely appropriate for the sanctions of section 22 as amended by your bill, to apply to that company in the suspension of the carrier's tariff. We think that the presence of the individual, the person to testify, to be cross-examined with respect to documents produced, is essential. The documents themselves may be meaningless without the witness to interpret them, to respond to cross-examination. We hope you will give serious consideration to that proposal.

Further, we hope that you will consider expanding the scope of the bill to bring within the coverage of section 22, violations of sections 14 and 15 of the Shipping Act as well as the rebating provisions of section 16. Violations of section 15 can be as pernicious, if not more so, than pervasive rebating.

We hope that the committee will give serious consideration to expanding the bill to cover violations of sections 14 and 15.

Finally, we hope that you will not make section 2 of the bill a 3-year measure. We believe that the provisions contained in section 2 of the bill should be part of any permanent legislative solution to the problem of rebating. We see no need to limit the thrust of section 2 of the bill to a 3-year period of time. That may well be appropriate for the amnesty provisions of the bill, but we are confident that the provisions you have in section 2 with appropriate amendments, will form the basis of any permanent legislation in this area.

I have listened to the testimony of the AIMS representative and, of course, Chairman Daschbach of the FMC, and generally, without having had the opportunity of studying them carefully, we support their recommendations for the strengthening of the penalties and the broadening of the types of persons who would be covered by these penalties in the bill.

Thank you, Mr. Chairman.

Senator INOUYE. Thank you very much, Mr. Sharood.

I believe you have been sitting here all day now listening to testimony——

Mr. SHAROOD. You have been sitting here also, sir.

Senator INOUYE [contining]. Of other witnesses.

The witness representing Delta suggested that malpractice or rebating or any other type of illegal practices in the shipping industry is not widespread. I gather you don't agree with that?

Mr. SHAROOD. No, sir, I do not. Of course malpractice covers a wide variety of activities. It is not simply a question of giving an illegal rebate to a shipper or to an agent or paying the tuition for somebody's children to go to school in Switzerland. It takes myriad forms.

Senator INOUYE. Well we realize there are thousands of ways of doing it.

Mr. SHAROOD. When he is talking about malpractices, I don't know whether he is talking strictly payment of cash rebates. But I think the record shows clearly that it is widespread and it covers virtually every trade where our ships are engaged.

Senator INOUYE. Do you believe that shipping companies would voluntarily come forward to disclose practices?

With respect to my prepared statement on behalf of Great Lakes and European lines, the first four pages briefly describe the company on whose behalf I am appearing today. It is a small carrier. It has been in business now about 2 years, serving the United States, Great Lakes ports of Chicago, Detroit and ports in northern Europe with a full container ship operation.

What I state basically here is that we feel strongly that a carrier such as Great Lakes and European lines would never have gone into business, and certainly will not remain in business without the protection of the Shipping Act of 1916. This is a vital statutory umbrella to any carrier operating in our trade.

I strongly believe that, particularly to the new entrant to the trade, such as GLE, it could not survive, could not even contemplate going into business had it been operating under a European style cartel situation in shipping. It would have been impossible.

We strongly believe that the Shipping Act is vital to our success and to the well-being of the shippers that this company serves.

We strongly support your bill, S. 2008. We believe that this legislation is long overdue. I, myself, began my career as an employee of the Federal Maritime Board in 1959, which then became the Commission in 1961.

I left the Commission in 1964 and went into private law practice. I left with the conviction that the Commission at that time was—I don't know quite how to put it—was a nonentity from a regulatory standpoint. Its teeth had been pulled.

I was very closely involved during the period 1961 to 1963 when the section 21 orders were being litigated in the cases referred to by the gentleman representing N.Y.K.

The upshot of all of that was of course that the Commission which had been created as a result of the Celler committee hearings, was totally emasculated from the standpoint of any meaningful ability to enforce our laws.

My company thinks it is time now, it is long overdue, to enact this kind of legislation, particularly section 2 of the bill dealing with discovery proceedings and failure to respond to discovery.

We would only offer several amendments to that section which are ind my statement, but perhaps require a slight bit of amplification.

I have pointed out that section 27 of the Shipping Act does not permit the issuance of a subpena to an individual located outside of the United States.

Section 27 has been interpreted so that a subpena duces tecum may issue against a corporation doing business in the United States with respect to the production of any documents located anywhere, whether the documents are in the United States or abroad.

But as we legitimately pointed out by the representative of Delta, it is impossible to secure the presence of a foreign witness, an official of the company headquartered in a foreign country.

We believe that section 27, in conjunction with your amendment to section 22 of the act should be amended to make it clear that an individual can be subpoenaed.

Now we know that the subpena cannot be enforced. We know that we cannot physically compel the presence of a representative of a

foreign steamship company from abroad to appear in Washington at an FMC hearing.

However, if that company should fail to produce that witness voluntarily, we believe that it would be, then, entirely appropriate for the sanctions of section 22 as amended by your bill, to apply to that company in the suspension of the carrier's tariff. We think that the presence of the individual, the person to testify, to be cross-examined with respect to documents produced, is essential. The documents themselves may be meaningless without the witness to interpret them, to respond to cross-examination. We hope you will give serious consideration to that proposal.

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We hope that the committee will give serious consideration to expanding the bill to cover violations of sections 14 and 15.

Finally, we hope that you will not make section 2 of the bill a 3-year measure. We believe that the provisions contained in section 2 of the bill should be part of any permanent legislative solution to the problem of rebating. We see no need to limit the thrust of section 2 of the bill to a 3-year period of time. That may well be appropriate for the amnesty provisions of the bill, but we are confident that the provisions you have in section 2 with appropriate amendments, will form the basis of any permanent legislation in this area.

I have listened to the testimony of the AIMS representative and, of course, Chairman Daschbach of the FMC, and generally, without having had the opportunity of studying them carefully, we support their recommendations for the strengthening of the penalties and the broadening of the types of persons who would be covered by these penalties in the bill.

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Senator INOUYE. Do you believe that shipping companies would voluntarily come forward to disclose practices?

Mr. SHAROOD. In my testimony I have indicated that we have no objection to the enactment of a very broad amnesty provision as now written into the bill.

There seems to be concern on the part of some Government agencies that we may be letting people off the hook from the standpoint of criminal violations.

I don't think realistically, however, that the provision will be meaningful, if it is narrowed down strictly to violations of the civil penalty violations of the Shipping Act. I don't think that in and of itself would provide sufficient incentive to cause people to come forward and bare their souls. I really can't believe that.

I think if you are going to enact some kind of an amnesty provision, then it must be broader than just the civil penalty provisions of the Shipping Act.

I think that if it is sufficiently broad to provide personal immunity to individuals from criminal prosecution, you will find a substantial degree of forthcomingness on their part.

I think everybody in the shipping industry, in their heart, wants to see these practices stopped, so we support amnesty.

Senator INOUYE. Well, I thank you very much, Mr. Sharood. You have been extremely helpful, and I'm sorry you had to wait this long.

Mr. SHAROOD. It was my pleasure.

Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF RICHARD N. SHAROOD ON BEHALF OF GREAT LAKES & EUROPEAN LINES, INC.

Mr. Chairman, Members of the Subcommittee, I appreciate the opportunity to testify today for my client, Great Lakes & European Lines, Inc. in support of S. 2008.

GLE is a small containership operator in the trade between U.S. Great Lakes ports and ports in the United Kingdom and northern Europe. It is wholly owned by American citizens and has its headquarters in Chicago, Illinois. GLE provides a weekly full containership service via the St. Lawrence Seaway using chartered German flag vessels which carry between two and three hundred containers per voyage. GLE is the first carrier to provide such a service to the Great Lakes.

During the winter months when the Seaway is closed, GLE maintains its service to shippers in the Great Lakes states by transporting the containers by rail from Norfolk, Virginia, under through bills of lading and at no added cost to the shipper who simply picks up or delievers his cargo at a rail yard instead of a shipside pier. We believe this service is a significant benefit to shippers in the Great Lakes who have always been frustrated by the seasonal nature of shipping through the Seaway.

The point I wish to make with the Committee is simply this: without our system of ocean shipping regulation as embodied in the Shipping Act, 1916, it would be impossible for a small carrier such as GLE to survive. It is difficult enough even with the Shipping Act umbrella to compete on the basis of rates and service with the giants of the container industry.

GLE hopes to succeed on the basis of filling a void in the shipping services previously offered exporters and importers in the Midwest and Europe. Malpractices of all types were not taken into consideration when the organizers of GLE determined that the economics of the trade would support a Great Lakes containership service. We should have known better.

In March 1962, the Antitrust Subcommittee of the House Judiciary Committee issued its comprehensive report on the ocean shipping industry. The Committee prefaced its recommendations concerning malpractices by stating at page 392: "The Subcommittee found U.S. foreign trades to be rife with malpractices . . . . While the primary responsibility lies in the Federal Maritime Commission, its

work cannot be wholly successful without renewed efforts by the steamship conferences and by the individual lines toward the establishment of a healthier industry-wide moral climate."

Apparently very little has changed since 1962 in terms of the moral climate pervading the shipping industry.

The testimony of former FMC Chairman Bakke before this Committee on March 18, 1977, clearly indicated that violations of the Shipping Act have continued on a grand scale and only in the past year has significant progress been made toward uncovering these practices. To what extent malpractices have distorted the economics of the US–UK/Continent trade, where GLE operates, we do not know. The details of FMC civil penalty settlements are not a matter of public record; however at least one grand jury is reported to be investigating aspects of the North Atlantic container trade.

I can tell you that in the eighteen months of GLE's existence, it has been subjected to a number of experiences which I would classify as malpractices on the part of conferences of carriers in the U.S. North Atlantic/Europe trades; for example, misinforming shippers that they will violate their conference dual rate contracts if they utilize GLE in a situation where the dual rate contract legally does not apply. We have considered filing complaints with the FMC under section 22 of the Shipping Act, 1916, but we are confronted with the fact that all relevant documents in the possession of the conferences are located in Europe and are effectively beyond the reach of GLE and the FMC.

The Antitrust Subcommittee report of 1962 recommended in this regard: ". ... the Commission's power to obtain books and records and other necessary information should be clarified so that it will be beyond dispute that the Commission has the right to obtain such records and information wherever located for preliminary investigations as well as for formal proceedings;".

Subsequent to that report the Commission's authority to obtain production of documents located abroad was sustained by the federal courts. The ingenuity of carriers knows no bounds, however. The judicial support given so-called "Section 21 Orders" was followed immediately by a waive of acts, decrees or edicts emanating from virtually every European capital prohibiting compliance with foreign (U.S.) orders for the production of documents. Since then the FMC has been totally frustrated. In the same manner, GLE and any other carrier or shipper is unable to secure production of documents lodged in conference headquarters in Europe even though these same conferences are existing by virtue of antitrust immunity granted by the FMC.

I was an employee of the FMC and its predecessor the Federal Maritime Board during the period 1959–1964. I know how much effort the Commission put into carrying out the recommendations of the Judiciary Committee and of this Committee which brought about the Shipping Act amendments of 1961, Public Law 87–346. The Commission's ultimate inability to enforce its orders for production of documents located abroad largely took the wind out of its sails. The Commission was born in 1961 amid widespread abuse of our shipping laws, went through a brief period of youthful vigor and reached old age by 1966 as a "regulatory agency" in any meaningful sense of that term. There have been only sporadic glimmers of life between 1966 and the past year.

We believe it is time to inject some life giving statutory blood. We believe the Commission is worth the effort particularly under the leadership of Dick Daschbach.

If carriers and shippers alike are to rely on the Shipping Act, 1916, as a code of conduct defining their rights and responsibilities under the law, then everyone must adhere to this code. My client has invested a substantial amount of capital on the assumption that it will prosper or fail on its merits as a competitive carrier. It is assumed we will have the chance to prove our worth to the shipping public and that we will not be done in because our competitors find it easier to play by a different set of rules. When it appears that the ground rules have been changed the Commission and the public must be able to challenge the players. At present this is impossible.

Based on former Chairman Bakke's testimony in March, it appears that the breakthrough in malpractice detection came about only as a result of Sea-Land's voluntary disclosures. He stated in part: "Perhaps the most important aspect of Sea-Land's disclosure is that the Commission now has evidence indicating a pervasive pattern of rebating in virtually all significant U.S. liner trades. After years of pursuing allegations of rebates based on undocumented reports from

reliable sources, and being frustrated in developing the information necessary for prosecution, at last the Commission has a body of information on which to proceed."

What if Sea-Land had not come forward? Should the Commission in the future be compelled to rely on such acts of self-incrimination? We think not.

Section 2 of S. 2008 is a logical and entirely proper means of dealing with this problem. A carrier which refuses to respond to legitimate requests for production of relevant documents should forfeit the privilege of engaging in our commerce so long as such refusal continues. You will no doubt hear cries of anguish from a variety of sources—unilateral regulation, violation of treaties, foreign retaliation, etc. We hope you and the Congress will not be swayed by the traditional rhetoric of the State Department and the foreign ship owners.

We wish to offer for your consideration several amendments to Section 2 of the bill. We believe it should apply to violations of section 14 and 15 of the Shipping Act in foreign commerce as well as sections 16 and 18(b). Section 14 prohibits a variety of malpractices including fighting ships, retaliation or threats against shippers and unfair or unjust discrimination among shippers.

Section 15, of course, is the backbone of the Shipping Act—antitrust immunity. Clearly violations of section 15 should be covered by section 2 of the bill. Rebating and failure to adhere to the published tariffs are not the limit of malpractices which have become almost a tradition in our foreign trades.

We believe the bill should make it clear that refusal to respond to Commission orders issued pursuant to section 21 of the Shipping Act will trigger tariff suspension.

It should be noted that the discovery procedures authorized by section 27 of the Act limit the subpoena power of the Commission to persons located in the United States. Issuance of a subpoena for persons located abroad is presently beyond the Commission's authority.

Since the Commission cannot unlawfully issue such a subpoena, failure to produce a witness from abroad can never trigger the tariff suspension process envisioned in the bill. Section 27 should be amended by the bill so that the discovery procedures and subpoena power apply to witnesses abroad in the case of proceeding instituted pursuant to section 2 of the bill.

Finally we do not believe section 2 of the bill should expire after three years. These amendments to the Shipping Act should become permanent law. Therefore, section 2 should be exempted from the expiration provision of section 4 of the bill.

With these amendments we believe that Section 2 of S. 2008 will give the Commission and the shipping public a viable means of attacking malpractices. The Shipping Act will finally have real teeth.

My client supports the amnesty provisions of section 3. We have no direct interest in this aspect of the bill but it seems appropriate to wipe the slate clean and then proceed to address the root causes of malpractices in our foreign trades. This will clear the air and enable carriers and shippers to contribute honestly and fully to this ongoing effort without further sanctions being imposed for their candor.

We greatly appreciate this opportunity to testify on this extremely important bill. We hope the Committee will give serious consideration to our proposed amendments to section 2 which will make this new procedure more meaningful to shippers and carriers as well as correct certain technical shortcomings.

Senator INOUYE. May the record show that we adjourned at 11:55 a.m.

The hearings are adjourned.

[Whereupon, at 11:55 a.m., the hearing in the above-entitled matter was adjourned.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

OCTOBER 18, 1977.

Hon. DANIEL K. INOUYE,
Chairman, Senate Commerce, Science and Transportation Committee's Subcommittee on Merchant Marine and Tourism, Washington, D.C.

DEAR SENATOR INOUYE: I am writing to you on behalf of the members of the Export, Import and Maritime Committee of The National Industrial Traffic League.

The League is a voluntary organization of 1,800 shippers, shippers' associations, boards of trade, chambers of commerce and other entities concerned with rates, traffic and transportation services of all carrier modes. It is the only shipper organization which represents all types of shippers nationwide. Its members include large, medium and small shippers who use all modes of transportation and who ship all types of commodities. The League is not a panel or committee of a trade group, or a spokesman for a particular commodity or transportation point of view, and does not permit carrier membership. The League's primary concern is to provide for the nation and all its shippers a sound, efficient, well-managed transportation system, privately owned and operated.

To arrive at positions reflective of the broad range of shipper interests within the League, the League membership at its annual and special meetings considers, debates and votes on actions to be taken. During its seventy years of existence, the League has frequently been the spokesman for the nation's shippers before Congress on proposed transportation and regulatory reform legislation.

Having reviewed the hearings before the Subcommittee on Merchant Marine and Tourism of the Committee on Commerce, Science and Transportation held during the first session of the Ninety-fifth Congress on illegal rebating in the United States ocean commerce, we are pleased to note that you have introduced Senate bill 2008, a bill to amend the Shipping Act of 1916 to provide for a three year period to reach a permanent solution of the rebating practices in the United Sttaes foreign trade. The National Industrial Traffic League, as policy, feels that an absolute minimum of regulation in connection with ocean transportation in foreign commerce is desirable because the complexity of international trade does not permit any one nation properly to exercise jurisdiction. Reliable, frequent common carrier service providing adequate space for shippers and consignees at fair and reasonable, stable rates is essential. To achieve this, the League recognizes the need to support the principle of the ocean freight conference but not to the extent of the elimination from world trade of reliable non-conference carriers who also provide a valuable service to shippers.

Our policy also provides for the favoring of legislation or regulations permitting the opening of rates on less than 90 days' notice provided that changed legislation or regulation will not detract from the principle that the opening of a rate is a permanent cancellation of the contract system with regard to that commodity.

The hearings before your subcommittee on March 18 and 25, 1977, above referred to, clearly indicated the lack of statutory authority to treat all carriers equally in attempting to enforce the provisions of the 1916 Shipping Act. We find the FMC investigations into rebating are becoming effective and quite possibly it may not be necessary to make it mandatory upon the FMC to suspend the authority of a carrier to enter a U.S. port as provided under paragraph C(2) of the proposed legisition. We would suggest that this legislation be amended to provide for discretionary authority to the Commission to invoke these actions should a respondent carrier or any carrier fail to respond to the procedures of the Commission in relation to an investigation or hearing held under an order issued by the Commission pursuant to this legislaton.

The Natonal Industrial Traffic League appreciates this opportunity to present its views on S. 2008, a bill addressing the problems of rebating in the United States foreign commerce, and requests that its views on the subject be included in the record of hearings.

We support the objectives of this legislation and urge your Committee to enact an early passage of this bill with the amendments suggested herein.

Very truly yours,

C. R. MERRITT,
Chairman, Export, Import and Maritime Committee.

KOMINERS, FORT, SCHLEFER & BOYER,
Washington, D.C., October 20, 1977.

Hon. DANIEL K. INOUYE,
Chairman, Subcommittee on Merchant Marine and Tourism, Committee on Commerce, U.S. Senate, Washington, D.C.

DEAR SENATOR INOUYE: At the conclusion of your Committee hearings on October 14, 1977, you indicated the record would be held open for a period for additional submissions. I believe that the Committee record would not be complete without attention also to the subject of my exchange of correspondence with you on July 7 and 13, 1977. I therefore respectfully request that copies of that correspondence be included in the printed record of your Committee's hearings on S. 2008. They are enclosed for convenience.

Very truly yours,

J. ALTON BOYER.

Enclosures.

KOMINERS, FORT, SCHLEFER & BOYER,
Washington, D.C., July 7, 1977.

Hon. DANIEL K. INOUYE,
Chairman, Subcommittee on Merchant Marine and Tourism, Committee on Commerce, U.S. Senate, Washington, D.C

DEAR SENATOR INOUYE: In your Committee's printed hearings, recently received, upon "Illegal Rebating in the U.S. Commerce," we have found a letter of March 25, 1977, from Federal Maritime Commission Chairman Karl E. Bakke to you (Hearings, p. 99). In that letter Chairman Bakke stated in part: "As you know, under our current statutory mandate from the Congress, the Commission is charged with the duty of insuring non-discriminatory access to and stability in the U.S. ocean trades. Thus, *the Commission is obliged to be "flag blind" in its administration of that mandate.*" (Emphasis supplied.)

With due respect, we believe that Chairman Bakke's statement is not entirely correct. In that connection we wish to call to your attention Section 1 of the Merchant Marine Act, 1920. That provision is both responsive to Mr. Bakke's comment and relevant to the general subject matter of your hearings.

Section 1 declares it "to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance" of the "United States . . . merchant marine," "ultimately to be owned and operated privately by citizens of the United States." It further directs the Federal Maritime Commission, as the successor to the United States Shipping Board, "in the making of rules and regulations, and in the administration of the shipping laws [to] keep always in view this purpose and object as the primary end to be obtained." There can be no doubt that "the shipping laws" include the Shipping Act, 1916, the Commission's basic statute.

Section 1 remains unchanged in pertinent respects. Its complete text, as appears in the January 1, 1977, Committee Print of the Merchant Marine and Shipping Acts, issued jointly by the Senate Committee on Commerce and Merchant Marine & Fisheries Committee of the House, is attached hereto.

Therefore, under Section 1 the Commission's "statutory mandate" is not "flag blindness." On the contrary, it is, as stated in Section 1, to "keep always in view" as " the primary end to be obtained," in "the making of rules and regulations" and in "the administration of the shipping laws," the development and maintenance of a citizen-owned United States merchant marine.

There is a wide and important difference.

Very truly yours,

J. ALTON BOYER.

Attachment.

MERCHANT MARINE ACT, 1920

[As amended through the 94th Congress]

(41 Stat. 988, chapter 250, approved June 5, 1920)

AN ACT To povide for the promotion and maintenance of the American merchant marine, to repeal certain emergency legislation, and provide for the disposition, regulation, and use of property acquired thereunder, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and, insofar as may not be inconsistent with the express provisions of this Act, the United States Shipping Board shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be obtained.

UNITED STATES SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRASPORTATION,
Washington, D.C., July 13, 1977.

J. ALTON BOYER, Esq:,
Kominers, Fort, Schlefer & Boyer,
Washington, D.C.

DEAR MR. BOYER: Many thanks for your July 7, 1977, letter.

I fully concur in your analysis. As Chairman of the Merchant Marine Subcommittee I shall do all that I can to ensure that our laws are administered in accord with the objective of developing and maintaining a strong privately-owned U.S.-flag merchant marine.

Sincerely yours,

DANIEL K. INOUYE,
Chairman, Merchant Marine and Tourism Subcommittee.

COUNCIL OF EUROPEAN & JAPANESE NATIONAL SHIPOWNERS' ASSOCIATIONS OF LONDON, ENGLAND,
Washington, D.C., October 21, 1977.

Hon. DANIEL K. INOUYE,
Chairman, Subcommittee of Merchant Marine and Tourism, Committee on Commerce, Science and Transportation, Washington, D.C.

DEAR SENATOR INOUYE: The Council of European & Japanese National Shipowners' Associations (CENSA) [1] appreciates the opportunity to comment on S. 2008, and is pleased to submit the following comments on the bill for the record.

As you and your Subcommittee may know, CENSA and the liner companies which it represents are committed to fair trading in ocean liner transportation and condemn malpractices of every kind, whether committed by carriers operating within a conference or by independents. We believe that malpractices do not serve the best interests of those engaged in ocean transportation and that their prevention and elimination redound to the benefit of all interests, commercial and public. CENSA therefore sympathizes with the professed objectives of S. 2008, insofar as these relate to malpractices.

Nevertheless, we regret that we cannot agree with the means proposed by S. 2008 to eliminate the malpractices referred to. Indeed we believe that the measures proposed essentially fail to address the causes of such malpractices. In our

[1] The Council of European & Japanese National Shipowners' Associations (CENSA) is comprised of the National Shipowners' Associations of Belgium, Denmark, Finland, France, the Federal Republic of Germany, Greece, Italy, Japan, the Netherlands, Norway, Sweden, and the United Kingdom, plus individual liner operators/container consortia from most of these countries.

view the bill aims at symptoms rather than causes, and fails to address the root of the problem as defined by Assistant Secretary of Commerce for Maritime Affairs Robert Blackwell in his testimony of October 14 to the Merchant Marine Subcommittee of the House Merchant Marine and Fisheries Committee, namely over-tonnaging. As Mr. Blackwell pointed out, the chaotic economic conditions in the American trades stem from the economic weakness and instability of the conferences themselves, and the malpractices complained of represent the natural if misguided efforts of individual operators to rectify the effects of these conditions. A comparison of most of the U.S. trades with the European trades with Africa, Asia and other parts of the world demonstrates that in strong conferences, where pooling and rationalization arrangements are the rule, rebates and other malpractices are virtually non-existent, as there is no commercial or economic justification for them.

We recognize that the pooling and other market sharing arrangements that prevail in the non-American trades appear to violate the academic approach to the U.S. antitrust law, which rigidly adheres to unrestricted competition, whatever the conditions and regardless of social, strategic and economic cost. We would suggest, however, that the whole history of liner shipping vindicates the position that unrestricted competition in the transportation field invariably results in price cutting, rate wars and chaotic conditions to the detriment of all concerned. Both the Alexander Committee and the Congressional sponsors of the Shipping Act, 1916, recognized that stability and uniformity of rates were indispensible to the viability of a modern and efficient merchant marine.

With respect to the severe penalties proposed by S. 2008 for failure on the part of foreign crariers to produce documents and other records in response to U.S. investigatory and enforcement proceedings, we agree with the position of the Department of State. In our view, strict implementation of such measures could have the regrettable consequence of leading to unnecessary and nonconstructive confrontations between the United States and its principal trading partners. We would amplify the position of the State Department by pointing out that such an assertion of U.S. jurisdiction over documents sited abroad unavoidably results in an extension of U.S. regulatory and investigatory authority into an area traditionally regarded by European and other governments as within their domestic jurisdiction. The so-called "blocking statutes" which require their citizens to reject the demands of foreign governments for documents and records located within the home jurisdiction, are a reflection of the view that sovereignty itself is at issue. In this connection, it should be pointed out that between themselves the European countries take a far more restrictive view of extra-territorial jurisdiction than does the United States; Great Britain, for example, in a 1969 Aide Memoire to the Common Market, expressly rejects the "Intended Effects Doctrine" of the U.S. antitrust laws.

Under international law, disputes resulting from such overlapping claims of jurisdiction can only be resolved by application of the rule of comity, where an accommodation is sought between the national interests of the countries concerned. While technically the United States may have the right to close its ports to vessels whose owners are unable to comply with a request for documents as a result of government order, we are confident that it will allow the rule of law to prevail, and in any event would never permit a dispute over extra-territorial jurisdiction to result in drastic interruption of American foreign commerce.

In summary, we would point out that the CENSA membership consists of shipping associations of twelve of the principal trading partners of the United States, which collectively account for 53.6 percent of the U.S. overseas liner trade. Foreign commerce is now responsible for over 20 percent of the U.S. GNP. At a time when balance of payments problems are acute for all the principal trading nations, including the United States, we would urge that the attention of the U.S. Congress be centered on ways to strengthen the viability of the conference system, rather than on legislation which has the potential of weakening the system without curing the abuses in question.

Yours very truly,

PETER G. SANDLUND,
Washington Representative.

WHITE & CASE, *November 18, 1977.*

JOHN D. HARDY, ESQ.,
U.S. Senate, Committee on Commerce, Science and Transportation, Washington, D.C.

DEAR MR. HARDY: Pursuant to your request, I submit the enclosed letter of Israeli counsel to Zim Israel Navigation Co. Ltd.

Very truly yours,

JEFFREY BARIST.

Enclosure.

S. FRIEDMAN & CO., *November 15, 1977.*

MR. JOHN HARDY,
Counsel to Merchant Marine Tourism Subcommittee, Committee on Commerce, Science and Transportation, U.S. Senate, Washington, D.C.

DEAR SIR: Mr. Jeffrey A. Barist of White & Case has passed over to us, as general counsel for Zim Israel Navigation Company Ltd. ("Zim"), your request for a statement on the legal position under Israel law with regard to disclosure by Zim to foreign States of commercial information relating to its activities.

As you are probably aware, Zim is regarded as the national shipping line of Israel and it is owned, to the extent of 50 percent, by the State of Israel and the General Federation of Labour (Histadrut).

Due to the security and political situation of Israel and in order to ensure that the State receives the necessary supplies of essential commodities, including strategic materials and oil, Zim, as the national carrier, has to keep confidential many of its activities. Also, because of the Arab boycott and the fact that many countries do not presently maintain diplomatic relations with Israel, Zim has to refrain from disclosing details of its foreign trade activities, including names of customers and particulars of shipments and sailings.

The nondisclosure of details of Zim's activities is regarded by the Government of Israel as essential to the security of the State and consequently the Minister of Transport has issued an order (the "Order") prohibiting Zim, its employees and any other person acting on its behalf from disclosing to foreign States or to any of their Authorities commercial information regarding its activities, unless with the Minister's permission.

The law under which the Order was given (the Commodities and Services (Control) Law, 5718–1957) provides that contraventions or breaches thereof are punishable, the punishment being imprisonment up to 7 years or a fine of up to IL. 10,000.—or both punishments together. In addition, the Court may, *inter alia*, order to close the business of the convicted person for such a period as it shall determine and it may order that a license granted to the convicted person shall be cancelled or suspended for such a period as it may determine ("person" includes corporation or company). Also, in certain instances, the Minister may, by order, appoint a person to manage, or control the management of, the undertaking to which the order relates ("undertaking" includes any enterprise or business in industry, commerce, building, transport and agriculture).

Consequently, if Zim or any of its employees or any other person acting on its behalf commits a contravention or breach of the Order, it or he may be liable to punishment under the law as above stated. Furthermore, in such a case, Zim may also run the risk of its business being closed, licenses granted to it being cancelled or suspended or a person being appointed by the Minister to manage, or control the management of, its business.

Since Zim operates a world-wide shipping business, the Order applies to Zim's activities not only in Israel but all over the world. Moreover, the Order specifically refers to transmission of information to foreign States or to any of their Authorities, which means that it is aimed at Zim's activities outside Israel and at its relations with the Authorities of foreign Governments. Therefore, if Zim or any of its employees commits a contravention or breach of the Order even outside Israel, such contravention or breach may be punishable under the law as aforesaid.

From the language and spirit of the law under which the Order to Zim was given it is obvious that the intention of the Israel legislator was that the provisions thereof should prevail over the provisions of any other law (with a few exceptions). Therefore, in our opinion, Zim or any of its employees will not be relieved from the duty to comply with the Order by the mere fact that the laws of any other country compel them or any of them to carry out an act which may

amount to a contravention or breach of said law and, if nevertheless they do so, they may be liable to punishment under the law as aforesaid.

Yours very truly,

A. ANABY.

[The following information was referred to on p. 26:]

QUESTIONS FOR THE DEPARTMENT OF JUSTICE

Question 1. Does the Department of Justice agree that the objective of U.S. shipping policy is to establish and maintain a strong merchant fleet owned by American citizens, operated by American crews, and fully capable of serving our international economic, military, and political commitments under all foreseeable circumstances?

Question 2. Part of our shipping policy is, of course, regulatory and is embodied principally in the Shipping Act, 1916. Those provisions are administered by the Federal Maritime Commission.

The regulatory part furthers the objective of our national shipping policy by seeking to assure that agreements and practices in the U.S. liner trades are not detrimental to the commercial interests of the U.S. To that end, the Shipping Act seeks to preserve competition in our liner trades.

(a) Would you agree that if the provisions of the Shipping Act are unequally applied so that they discriminate against U.S.-flag carriers, to their detriment, that those provisions are not being used to preserve competition in our liner trades?

(b) If that is so, it follows, does it not, that the purpose of the Shipping Act, and the objective of our national shipping policy are being frustrated by the discriminatory application of the law?

Question 3. (a) What divisions or sections within the Department of Justice have responsibilities which affect our maritime industry, and our national shipping policy?

(b) Describe the activities and responsibilites of each of these entities.

Question 4. I realize you cannot answer the following question from memory. So please supply the information for the record. The Federal Maritime Commission is, of course, the agency of government charged with implementing the shipping act.

(a) With respect to matters, proceedings, etc. before the FMC or its predecessor from 1960 to date, in how many has the Department of Justice participated as a party, intervenor, etc.

(b) As to each such proceeding, etc. please indicate what the subject matter was, and whether the parties to the proceeding were U.S.-flag carriers, foreign-flag carriers, or some combination of U.S. and foreign-flag carriers?

(c) Please submit similar information to that requested in (a) and (b) with respect to any federal court cases involving malpractices in the shipping industry and civil or criminal violations of the antitrust laws.

Question 5. (a) Does the Department of Justice believe that rebating is wide spread throughout the U.S. liner trades?

(b) Does the Department of Justice believe that the Federal Governments efforts to remedy that situation must be increased?

(c) Is it accurate to say that rebating and similar malpractices in the shipping industry also violate the anti-trust laws?

Question 6. (a) How does the Department of Justice view its role and position in individual cases vis-a-vis the Federal Maritime Commission with respect to agreements submitted for FMC approval pursuant to section 15 of the Shipping Act?

(b) In determining its role and position in these individual cases does the Department of Justice consider whether the course it is pursuing furthers the purpose of the Shipping Act, and our national shipping policy?

(c) In determining its role in these cases does the Department of Justice consider its responsibilities under the anti-trust laws: and if so, which consideration is dominant—the objectives of our national shipping policy, or the department's antitrust responsibilities?

Question 7. Where there is evidence of malpractices in the shipping industry which may be civil or criminal violations of the antitrust laws, how does the Department of Justice view the effect of the judicial doctrine of "primary

jurisdiction" on its role and responsibilities vis-a-vis those of the Federal Maritime Commission?

Question 8. Is there any liaison, formal or informal, between the Department of Justice and the FMC with respect to those areas where each agency has some responsibility? If so please describe it, and whether it is on a continuing basis?

Question 9. (a) Without divulging any confidential or prejudicial information, can you tell the committee if the Department of Justice is currently investigating any carriers for malpractices or other violations of law directly growing out of violations of the shipping act?

(b) If so, are any of the carriers involved foreign-flag carriers?

Question 10. The attorney general has said that cooperation by a foreign firm or government is a significant factor influencing the department's prosecutorial judgment.

The previous chairman of the FMC testified before this committee that there are great obstacles to uniformity of enforcement of our rebate laws because in the governments of some foreign carriers have laws forbidding their nationals to produce documents for our inspection.

In fact, Zim Israel Navigation Co. Ltd. is currently challenging the authority of the FMC to require it to produce information in the agency's investigation of possible rebating.

Among other things, as I understand it, Zim is contending that certain of the data sought is located abroad and therefore beyond the reach of the FMC. Moreover, Zim contends Israeli law bars production of such documents for another country.

(a) Does the Department of Justice share the view of the former chairman of the FMC?

(b) Has the Department of Justice ever refrained from investigating or prosecuting a foreign-flag carrier for the reason that the department was unable or would be unable to obtain necessary documents located abroad or the cooperation of the foreign firm or its government in other ways?

(c) Has the Department of Justice ever litigated the question of whether a foreign-flag common carrier by water may refuse to comply with an otherwise lawful subpoena *duces tecum*, etc. from a Federal agency requiring production of documents in its possession on the ground that disclosure would contravene foreign statutes or foreign public policy?

Question 11. For the record, would the department please submit a memoranda of law and conclusion on the question of whether a foreign-flag common carrier by water may refuse to comply with an otherwise lawful subpoena *duces tecum*, etc. from a Federal agency requiring production of documents in its possession on the ground that disclosure would countravene foreign statutes or foreign public policy?

Question 12. Paragraph 9 of the settlement agreement between Sea-Land Service, Inc. and the Federal Maritime Commission provides that "in the event of changes of law or other circumstances at any time during the term of the agreement, Sea-Land has the right to petition the commission for modification of mitigation of any of the requirements of the agreement."

The intent of S. 2008 as expressed in section 3 of the bill (p. 6) is that enactment of the bill would not constitute "changes of law or other circumstances" within the meaning of the FMC/Sea-Land agreement.

In other words, it is intended that the FMC/Sea-Land settlement agreement remain unaffected one way or another by S. 2008.

(a) In the department's opinion does the provision in S. 2008 accomplish what it intends to do?

(b) If so, please submit a legal memorandum supporting the department's opinion.

(c) If S. 2008 does not achieve what it attempts to do, please submit amendatory language to accomplish its purpose.

Question 14. In the department's view does the port closing sanction in S. 2008 raise any legal or constitutional problem?

Question 15. During the March hearings on rebating one witness testified as follows: "A much more sophisticated approach is possible and, I submit, virtually undetectable. I have heard of one foreign flag shipping line which had vessels operating both in the U.S.-foreign and the foreign-to-foreign commerce. This company had a customer who was demanding a rebate on goods being imported into the United States on its vessels. The customer owned a petroleum distribution

outlet in another country, through another subsidiary, from which the carrier's vessels purchased bunker fuel. The carrier would give the rebate by paying a higher price for the bunker fuel on its foreign to foreign operations to an entirely different subsidiary of the same parent corporation. I defy any of the big eight auditing firms to find that one, even given full access to a foreign flag carrier's books, which they would never get."

(a) Is it likely that the department would discover such practices in any investigation it is or may undertake?

(b) What obstacles would there be to investigating this type of situation and enforcing our anti-rebating laws?

Question 16. With respect to our present system of regulation and antitrust exemptions in the ocean shipping industry, the assistant attorney general of the antitrust division testified before a house subcommittee on March 29, as follows: "The task force conducted a comprehensive study of the regulation and antitrust exemptions involved in the ocean shipping industry, . . . and concluded that the present system of regulation causes the public to pay far higher freight rates than would be available under a competitive system."

(a) In its task force did the department consider the extent and effect of rebating in our ocean trades?

(b) Did the task force consider whether the rebating, which is now rampant in our ocean trades, itself is anti-competitive?

(c) Did the task force consider whether freight rates might be higher because of rebating, i.e., who ultimately pays the cost of rebating?

Question 17. In his testimony before the House subcommittee, the assistant attorney general said that the task force concluded that "the regulaton of the shipping industry is in need of drastic reform."

S. 2008 is, of course, an attempt to begin just such reform.

I find the department's testimony this morning somewhat disappointing therefore because it does not address itself to the rebating situation; the department's role and responsibility in ocean shipping regulation; and whether the approach of S. 2008 is the kind of reform the department believes is necessary.

(a) Does the department support S. 2008?

Question 18. In his testimony before the House subcommittee the assistant attorney general said the task force study concluded "that FMC regulation has failed to meet congressional expectations in preserving independent competition and promoting a workable competitive industry."

(a) In reachng that conclusion, did the task force consider whether and the extent to which rebating in our ocean trades, and the inability of the FMC to reach foreign carriers, were

Question 19. (a) Would FMC determinations under the new section 22(c) of the shipping act be governed by the requirements of administrative procedure and judicial review (Public Laws 89–554 and 90–23)?

(b) Would you support your answer with a legal memorandum!

DEPARTMENT OF JUSTICE,
Washington, D.C., October 28, 1977.

Hon. DANIEL K. INOUYE,
Chairman, Subcommittee on Merchant Marine and Tourism, Committee on Commerce, Science and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The Attorney General has asked me to respond to your letter of October 26 concerning answers to specific questions delivered to Department witnesses at the completion of their appearance before your Subcommittee on Merchant Marine and Tourism on October 12.

We sincerely regret that we were unable to provide the responses by October 20 as you had requested. As you know, the questions involve substantial and important policy and factual considerations. We have tried to prepare responsive and useful replies at the earliest time, but these responses have had to be reviewed by the heads of the Offices concerned.

In view of the urgency expressed in your letter, we are forwarding our responses without obtaining the usual Executive Branch clearance. Thus, the views expressed are those of the Department only and do not necessarily represent the views of the Administration.

As was pointed out at the hearing, we strongly oppose the blanket grant of immunity from prosecution under the laws of the United States contained in section 3 of S. 2008, a position which is shared by the Treasury Department, the

Maritime Administration and the Department of Commerce, the Securities and Exchange Commission, and the Federal Maritime Commission. In fact, we do not favor any grant of immunity or amnesty. If one is to be enacted it should not go beyond those violations of the Shipping Act encompassed in the first sentence of subsection (d)(1) proposed in section 3 of the bill. In addition, we think that it should be confined to disclosures which may be made after enactment of the bill.

Accordingly, if an immunity or amnesty provision is to be enacted, we would suggest that proposed new subsection (d)(1) of section 32 of the Shipping Act, 1916, be amended to read as follows:

> (d)(1) Subject to the provisions of paragraph (2) no penalty shall be imposed on any person under section 16 (other than paragraphs First and Third) in foreign commerce of section 18(b) for any act which may be a violation of either section if—
>
> (A) such act occurred before the date of enactment of this subsection; and
>
> (B) during the period beginning on the date of enactment and ending one year thereafter, the person who committed such act has made a good faith disclosure to the Commission without knowledge that it was the subject of an investigation relating to such act by an agency of the Federal Government.

We note that the Federal Maritime Commission has expressed the view that any immunity or amnesty should be limited to rebating violations of the Shipping Act. See "Statement of the Honorable Richard J. Daschbach, Chairman, Federal Maritime Commission before the Merchant Marine Subcommittee of the Senate Committee on Commerce, Science and Transportation," September 28, 1977, page 13. Should the Maritime Commission propose language sufficient to so limit the amnesty, we would defer to its position as the agency charged with administering the Shipping Act.

Again we apologize for no tgetting the material on S. 2008 to you sooner.

Sincerely,

PATRICIA M. WALD,
Assistant Attorney General.

DEPARTMENT OF JUSTICE RESPONSES TO QUESTIONS

Answer 1. The Department agrees that this is the policy expressed in Section 101 of the Merchant Marine Act of 1936. The Shipping Act of 1916, on the other hand, is a regulatory, not a promotional statute.

Answer 2. To the extent that regulation affects individual lines in a discriminatory and burdensome manner, it may inhibit their ability to compete on an equal basis. Such an uneven application of regulatory burdens would be contrary to competitive policy.

The chief mechanism at the Commission's disposal to preserve competition is its ability to disapprove anticompetitive agreements. The majority of the agreements that come before the Commission for approval involve foreign and U.S. flag carriers. With respect to these agreements the effect of FMC regulation would seem to fall equally on U.S. and foreign carriers. More difficult questions arise with respect to enforcement of Shipping Act prohibitions against certain forms of conduct. For example, if the antirebating provisions of the Act were enforced against U.S. flag carriers, but not against foreign flag carriers, U.S. flag carriers might be competitively disadvantaged. The Department believes that there is much that can be done legislatively to preserve and foster competition in the ocean shipping industry and would welcome the opportunity to submit its views on this subject in detail.

Answer 3. The Civil Division, Admiralty & Shipping Section, prosecutes for civil penalties Shipping Act violations referred to it by the FMC; seeks judicial enforcement of administrative subpoenas issued by the FMC; represents the Maritime Administration/Maritime Subsidy Board in actions seeking judicial review of Administration/Board proceedings and decisions.

The Antitrust Division is responsible for enforcement of the antitrust laws in the shipping industry. This involves investigation and prosecution of conduct violative of the antitrust laws and not immunized by the Shipping Act of 1916. The Antitrust Division intervenes before the Federal Maritime Commission to ensure that competitive polices and issues are given adequate consideration by

the Commission. In this role, the Division attempts to insure that only those agreements are approved which are consistent with the public interest standard of Section 15 of the Shipping Act, 46 U.S.C. § 814.

The Criminal Division, Government Regulations and Labor Section, prosecutes for criminal penalties relating to Shipping Act violations referred to it by the Federal Maritime Commission. This Section seeks criminal informations and indictments through its staff attorneys or through an appropriate United States Attorney.

Answer 4(a)(b). FMC Proceedings in which the Department of Justice Participated:

1966.—1. Proposed Merger of American President Lines, American Mail Line and Far East Line. (Proposed merger among U.S. flag carriers. Department of Justice intervened).

1967.—2. FMC Agreement No. 9648—Inter American Freight Conference (Proposed U.S.-South American conference involving U.S. and foreign flag carriers. Department of Justice submitted a letter opposing interim approval and requested a hearing).

3. Calcutta, East Coast of India and East Pakistan/U.S.A. Conference, Proceeding on Order to Show Cause. (Department of Justice intervened in proceeding involving U.S. and foreign flag carriers. FMC ordered conference to show cause why it shouldn't be disapproved for failure to supply discovery.)

1969.—4. Trans Atlantic Freight Conference (Department of Justice intervened in so called "superconference" case involving a proposed merger of major North Atlantic conferences into one conference comprised of U.S. and foreign flag carriers).

5. U.S. Lines—Sea-Land Charter/Merger (Department of Justice intervened in proposed merger of two U.S. flag carriers).

1970.—6. Inter American Freight Conference, Cargo pooling Agreements, Nos. 9682, 9683, 9684 (Department of Justice intervened in proposed pooling agreement involving U.S. and foreign flag carriers.

7. FMC Agreement No. 9989—Agreement for Exchange of Information (Department of Justice intervened in proceeding involving U.S. and foreign flag carriers).

Agreement 10286—Winac Pool. (This revenue pooling agreement between members of the West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference, including U.S. flag carriers, was opposed by Department of Justice. We are, at present, a party to the Winac proceedings).

Agreement 9981-5—Far East Discussion Agreement. (Department of Justice opposed the approval of a discussion agreement among 23 ocean carriers (including U.S. and foreign carriers). The agreement provided for discussion of a wide range of topics e.g. rates, costs, cargo flows).

Agreement 10135-4—Far East Conference and Pacific Westbound Conference Member Lines Agreement. (The Department of Justice requested disapproval of an extension of a conference agreement including U.S. and foreign flag carriers which would allow for discussion and agreement between direct service competitors).

Agreement 10022-4—United States/Europe Discussion Agreement. (This agreement among 14 ocean carriers serving the U.S.-Europe trade provided for discussion of rates, rules, practices and tariffs. Department of Justice requested disapproval of this agreement, involving U.S. and foreign flag carriers).

Agreement 10294—Cancellation of Consolidation Allowances. (This agreement provided for the elimination of off-pier consolidation allowances to freight forwarders and other consolidators. Both U.S. and foreign flag carriers were involved. The Department of Justice is presently a party to these proceedings).

Agreement 10022-5. (See 10022-4 above). This FMC filing by the interested carriers sought to extend the expiration date of the prior agreement by 90 days.

Agreement 10235—CONFICO. (A group of independent freight forwarders attempt to form a corporation and do business as a NVOCC. This action does not involve ocean common carriers).

Agreement 9981-5(A) (See above) Department of Justice opposed the one year extension of this agreement among U.S. and foreign flag carriers serving the U.S.-Far East trade.

Agreement 10300—Med Gulf/Minibridge Rate Agreement. (The Department of Justice requested disapproval of an agreement which would allow both all-water carriers and minibridge services to discuss rates for cargo in several trades. Both U.S. and foreign flag carriers were parties to this agreement).

Agreement 10050–2—U.S. Flag-Far East Discussion Agreement. (The Department of Justice opposed a two-year reapproval of a discussion agreement among 8 U.S. flag ocean carriers serving the U.S.-Far East trade).

Agreements 10044–3 and 10041–4. (Motions to Intervene were filed in these cases concerning pooling, sailing and equal access agreements between U.S. and Peruvian ports. The Department of Justice is presently a party to the proceedings).

Agreement 8200–5—Pacific Westbound and Far East Conference Member Lines. (An agreement among U.S. and foreign flag carriers in the stated conferences to discuss and agree upon rate differentials was opposed by the Department of Justice).

Agreements 8210–36 and 9214–23. (Two conferences whose membership includes both U.S. and foreign flag ocean carriers, asked for permission to extend conference agreements to cover traffic to and from inland points. The Department of Justice recommended disapproval).

Agreement 10023–8—Europe-Pacific Coast Rate Agreement. (The Department of Justice opposed the indefinite extension of this agreement which allowed by U.S. and foreign flag carriers to discuss rates, charges and related matters).

CIVIL PENALTY ACTIONS FILED BY CIVIL DIVISION SEEKING PENALTIES FOR SHIPPING ACT VIOLATIONS

Nature of violation	Court	Flag
1. Failure to file dual rate contract modification.	Eastern District of Louisiana	Both.
2. Failure to file dual rate contract modification.		
3. Failure to file dual rate contract modification.	Eastern District of Virginia	United States.
4. Failure to charge tariff rates	Northern District of California	Do.
5. Failure to file conference working arrangement.	do	Foreign.
6. Failure to charge tariff rates	do	United States.
7. Failure to file tariff	Southern District of Florida	Do.
8. Failure to file tariff	do	Do.
9. Failure to charge tariff rates	Southern District of New York	Foreign.
10. Failure to charge tariff rates	do	Do.
11. Failure to charge tariff rates	do	United States.
12. Using unapproved dual rate system.	Eastern District of Louisiana	Both.
13. Failure to file tariff	Southern District of Florida	Foreign.
14. Failure to file tariff	Northern District of Illinois	Do.
15. Failure to file cooperative working arrangement.	Northern District of California	Both.
16. Failure to file cooperative working arrangement.	District of New Jersey	United States.
17. Failure to file cooperative working arrangement.	Middle District of Florida	Both.
18. Failure to file cooperative working arrangement.	do	United States.
19. Failure to file tariff	Southern District of Florida	Do.
20. Using unapproved dual rate system.	Northern District of California	Both.
21. Using unapproved dual rate system.	do	Do.
22. Using unapproved dual rate system.	do	Do.
23. Failure to file cooperative working arrangement.	do	Foreign.
24. Failure to file cooperative working arrangement.	Southern District of New York	Both.
25. Failure to charge tariff rates	Southern District of Florida	United States.
26. Failure to charge tariff rates	Eastern District of Louisiana	Foreign.
27. Failure to charge tariff rates	Southern District of Florida	United States.
28. Failure to charge tariff rates	do	Do.
29. Failure to file tariff	Southern District of New York	Foreign.
30. Failure to charge tariff rates	do	United States.
31. Failure to charge tariff rates	Eastern District of Louisiana	Foreign.
32. Failure to file tariff	District of Puerto Rico	Do.
33. Failure to file tariff	District of New Jersey	United States.
34. Failure to file cooperative working arrangement.	Eastern District of Pennsylvania	Do.
35. Rebating	District of District of Columbia and Northern District of Texas.	Foreign.
36. Rebating	Southern District of New York	Do.

CRIMINAL ACTIONS FILED BY CRIMINAL DIVISION FOR SHIPPING ACT VIOLATIONS

Nature of violation	Court	Flag
1. Rebating	Southern District of New York	United States.
2. Rebating	----do	Foreign.
3. Rebating	Northern District of California	United States.
4. Rebating	----do	Do.
5. Rebating	District of New Jersey	Do.
6. Rebating	Northern District of California	Do.
7. Rebating	Southern District of New York	Do.
8. Undue preference, discriminatory rates.	Eastern District of New York	Foreign.
9. Rebating, conspiracy	Southern District of New York	Do.
10. Rebating	----do	Do.
11. Rebating	Southern District of Florida	United States.
12. Rebating	Northern District of California	Do.
13. Rebating	Southern District of Florida	Foreign.
14. Rebating	Northern District of Texas	Do.
15. Rebating	District of New Jersey	United States.

Answer 5(a). The Department does not have verifiable evidence concerning the extent to which rebating has occurred or is occurring in the U.S. liner trades. The Department does believe, however, that strong incentives to rebate are rooted in the conference system which imposes artificial constraints on inter-carrier rate competition and generates excess capacity.

(b) The Department believes that the problem of rebating should be re-examined, with specific emphasis on its fundamental causes and effects. The incentive for rebating derives from the strictures on open competition inherent in the enforced price uniformity imposed by the conference system.

(c) Rebating alone, which is merely the charging of a rate not reflected in a published tariff, would not violate the antitrust laws unless agreed to by two or more lines, or if predatory in purpose or effect. An agreement to rebate would constitute a combination in restraint of trade and a violation of Section 1 of the Sherman Act. Predatory rebating might constitute an attempt to monopolize in violation of Section 2 of the Sherman Act.

Answer 6(a). The Department of Justice participates in two related capacities before the FMC. First, the Department submits comments concerning various agreements proposed to the Commission for approval or reapproval. Second, the Department may become a party in Commission hearings. In these capacities the Department seeks to ensure that the Commission, consistent with its responsibilities under Section 15 of the Shipping Act, properly weighs the anticompetitive effects and purported public benefits of proposed agreements and considers less anticompetitive alternatives.

(b–c) The Department does consider the purpose of the Shipping Act and the National Shipping Policy in determining its position on various agreements. Indeed, the Department's role is consistent with the Commission's view of its own responsibilities under Section 15. The Commission has held that Section 15 prevents it from overriding antitrust policy more than is necessary to meet a serious transportation need, public benefit or valid regulatory purpose.

Answer 7. The Department's position with respect to primary jurisdiction issues relating to activities which may violate the antitrust laws would depend upon the particular circumstances of each case.

Answer 8. The Civil Division, through informal liaison, is usually apprised in advance of matters the FMC intends to refer to it for handling. This typically is by telephone between Deputy General Counsel, FMC, and Chief, Admiralty & Shipping Section. The Antitrust Division has no formal liaison with FMC. The Criminal Division maintains informal liaison with the Deputy General Counsel, FMC through the Chief, Deputy Chief and staff attorneys of the Government Regulations and Labor Section.

Answer 9. The Antitrust Division is conducting two grand jury investigations that concern maritime related activities. One of the grand juries involves foreign flag carriers. In addition, two U.S. Attorneys Offices are currently investigating carriers for violations of such statutes as the Currency and Foreign Transactions Reporting Act and the internal revenue laws.

Answer 10(a). The Department agrees that problems involving foreign compulsion complicate the investigation of violations of U.S. law and make uniform enforcement more difficult.

(b) Where production of foreign documents is impossible, it is still possible in some instances to conduct an investigation concerning foreign firms on the basis of domestically located documents. Where possible, the Department will pursue this approach.

(c) Yes. See *Federal Maritime Commission* v. *DeSmedt*, 366 F. 2d 464 (2d Cir. 1966), cert. den. 385 U.S. 974. See also 268 F. Supp. 972 (S.D.N.Y. 1967).

Answer 11. The issue posed is a difficult one that has not been fully resolved by the courts. Generally, where a private party is presented with conflicting directives by two sovereigns, courts will engage in a balancing process to determine which sovereign will prevail.[1] This process involves an analysis of the principles of comity in light of the facts of the particular case. The determination generally centers upon a weighing of respective national interests in the conduct sought to be affected. The Department takes the position that the United States antitrust laws represent a fundamental and important national policy and would argue before a court that our national interest in effective antitrust enforcement should be given great weight. Courts may also take into account, such factors as the nationality of the party affected and the territory within which the affected conduct takes place. In sum, there is no hard and fast legal doctrine that can be relied upon to produce predictable results over a broad range of factual situations.

Answer 12. The Department has serious doubts that the provision does accomplish its intended purpose. To argue that the provision accomplishes what it intends to do is to argue that S. 2008, if enacted, would not constitute a change in law or other circumstances—clearly not so. Moreover, the Department cannot conceive of amendatory language which would validly vitiate paragraph 9 of the settlement agreement. The parties are entitled to the fruits of their agreement.

(There was no question 13 in the questions submitted to the Department).

Question 14. The Department believes that the port closing sanction raises very definite problems. Port interdiction is mandated whenever a respondent fails to comply with administrative discovery, apparently without any right to be heard on the reason for that failure. Should that occur, we would anticipate an immediate application to the courts for an injunction and judicial review. There also may well be treaties of friendship and navigation, which conflict with the proposed sanction.

Answer 15. (a) The likelihood of discovering evidence of illegal practices such as described would be impossible to determine except on a case-by-case basis and then such discovery would depend on many variables, including the firms involved, their nationalities, and the evidence at hand. Of course the absence of jurisdiction over foreign business records severely limits the investigatory opportunities available in domestic investigations.

(b) The principal obstacle would be the lack of access to the records of foreign corporations.

Answer 16. (a) The Task Force study did not undertake a detailed analysis of the extent to which rebating exists or of its effect in U.S. foreign trades. It did consider what the likely causes of the practice are and its implications for regulatory reform. The Task Force concluded that rebating is essentially an incident of the enforced price inflexibility of the conference system. The Task Force suggested that a right of independent action requirement for conferences would greatly reduce the incentives for rebating.

(b) The Task Force did not consider rebating, standing alone, to be anticompetitive. Unless agreed to, or predatory, rebating is simply a form of price competition, albeit secret.

(c) The Task Force did not consider the level of conference rates to be related in any real sense to the existence of rebating. The existence of rebating, however, suggests strongly that conference rates are in excess of the competitive norm. The level of conference freight rates is a function of the cartel's market power.

Answer 17. (a) The Department does not oppose legislative efforts designed to aid in enforcing existing law. The Department does oppose, however, the blanket amnesty provision contained in S. 2008. Further, the Department is doubtful whether a law can be fairly enforced against a form of conduct that is the logical result of a system of government sanctioned regulation.

[1] *See* Restatement (Second) of Foreign Relations Law § 40.

The Department believes that a right of independent action requirement for conferences would significantly decrease the incidence of rebating by reducing the incentive to engage in secret competition.

Answer. 18. The Task Force's conclusion was based upon its finding that FMC regulation has promoted cartelization of the industry. The Task Force did not consider the FMC's lack of enforcement success against foreign flag rebaters to be related to this failure. Rebating is an incident of the price uniformity imposed by the extent to which the industry is cartelized. The existence of rebating is simply a signal that cartel enforcement has not been effective in dampening the competitive instincts of all its members.

Answer 19. (a) In our opinion, yes.

(b) The bill is silent as to any review of the "final order" to be issued by FMC following hearing and investigation pursuant to new section 22(c)(1). Accordingly, it would seem to be covered by the Administrative Orders Review Act, 28 U.S.C. 2341–2352, providing for review in the appropriate court of appeals *on the agency record.* Since, therefore, the matter would *not* be "subject to a subsequent trial of the law and the facts de novo in court" (5 U.S.C. 554(a)(1)), the provisions of Public Laws 89–554 and 90–23 govern.

[The following information was referred to on p. 19:]

ADDRESS BY THE HONORABLE GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES, DEPARTMENT OF JUSTICE, BEFORE THE AMERICAN BAR ASSOCIATION ASSEMBLY LUNCHEON

Comity is a very small word that stands for a very large principle. Comity is a way of saying fair play—that each of two parties will yield to the one which has interests that are clearly paramount. It is a word signifying a concern for common courtesy and decency in conduct toward others.

Where conflicts arise between sovereigns, the sovereigns have an obligation to resolve the conflicts with restraint, coperation, and good will. That is the essence of comity, and today I would like to tell you what the Department of Justice is doing to foster comity between our jusice system and those of foreign governments and between federal and state justice systems.

In recent decades, under the pressure of rapidly increasing international trade and a consequential increase in federal court litigation involving foreigners, the United States became concerned with formally establishing international comity. Unless the United States rendered effective judicial assistance to foreign courts, little assistance to the courts and litigants of this country would be forthcoming from abroad.

In 1964 Congress enacted a law covering such things as serving documents and obtaining evidence, subpoenaing witnesses. and transmitting requests for judicial assistance on behalf of the courts of other countries. It is one of the most forward-looking attitudes toward international comity of any country in the world.

Although reciprocity is an implied part of comity, the United States has made it clear that the assistance that we render comes without regard to reciprocity but is given as a matter of law. There are many cases demonstrating this policy of offering assistance whenever possible, and it is safe to say that no other country in the world offers such cooperation. We have clearly set ourselves up as an example, and we hope other countries will follow suit.

It is axiomatic in law that the best way to understand a rule or doctrine is to observe it under strain. That is as true for the principle of comity as it is for any other, and nowhere is the strain greater than in the application of antitrust laws.

The Supreme Court has noted that Congress, in passing the Sherman Act, was operating to the full extent of the Commerce Clause. That law applies to interstate and foreign commerce and to trade in both exports and imports in the United States. Hence, the scope of the Sherman Act does not stop at the water's edge, and foreign businessmen—and their sovereign governments—view this as an extraterritorial application of U.S. laws.

We are scrupulous in not reaching beyond our authority, but our law enforcement obligation does not allow us to look the other way when an antitrust in-

vestigation involves foreign nationals. The resulting interactions with foreign nations often involve no small amount of expaining on our part and a large measure of tact and forebearance as well.

Sometimes comity causes us to stay our hand. For instance, about two years ago the Justice Department's Antitrust Division investigated a merger in a foreign country by nationals of that country who happened to be among the world's largest producers of an impotant industrial product.

The firms involved exported most of their production to the United States, and significant assets of the combined firms were located here. Further, while there was no evidence of an explicit conspiracy, the marketing of the product generally followed a pattern of oligopoly pricing.

In short, there was not much question that United States courts had subject-matter jurisdiction over the merger.

Nonetheless, the Antitrust Division concluded that since the merger involved stock acquisitions of foreign companies on a public exchange in the foreign country, and since the merger primarily involved control of assets located in the foreign country, and since the government concerned communicated to us that any attempt by the United States to block the merger would be deemed a serious infringement of a vital national interest, the Justice Department declined to assert U.S. jurisdiction on grounds of comity and foreign policy.

Another example of comity occurred last year, after the United States and Japanese justice agencies signed a mutual assistance agreement in the investigation and prosecution of any illegal activities related to sales in Japan by Lockheed Aircraft Corporation.

The Tokyo District Court sought assistance under the agreement in taking depositions in the United States from three former Lockheed officials. The Toyko court issued letters rogatory to the Los Angeles District Court seeking assistance. The Los Angeles Court subpoenaed the witnesses, who promptly invoked their Fifth Amendment rights.

To accommodate the Japanese Government, the Department of Justice granted the witnesses immunity from prosecution under U.S. law, thus removing their Fifth Amendment grounds. It was an unprecedented exercise of the Attorney General's discretion, and it was done essentially in a spirit of comity.

On two recent occasions—as a matter of comity—the Department of Justice has sent documents to foreign antitrust agencies regarding possible liability by American and foreign corporations under foreign antitrust law. Those documents were not received by us under subpoena and did not otherwise require confidentiality.

We will, in the interest of comity, continue this cooperation with foreign antitrust agencies—even when it exposes United States firms to liability for violating foreign laws. There is no compelling United States interest in protecting United States nationals who violate foreign laws.

Two other examples of international comity may be found in the new antiboycott law and in pending legislation to prevent American enterprises from resorting to bribery of foreign officials in doing business abroad. The former, signed by President Carter in June, prevent foreign governments from binding U.S. firms to practices of racial, religious, or economic discrimination in United States commerce, thus by law reassuring nations which may be the victims of such discrimination. The latter piece of legislation, now pending in the House, would have as one of its purposes preventing American interests from utilizing illegal means to corrupt the officials of a foreign nation.

Comity may be expressed many ways. It may include notification to other governments of contemplated legal actions that significantly affect them. It may include giving other governments the opportunity to consult regarding interests relevant to the contemplated action. It may involve investigation techniques—that is to say, in what way, and under what circumstances, to seek what kinds of information from foreign governments.

But while we try to exercise comity in enforcing antitrust laws, some nations find our position unacceptable. Several nations have passed laws to prevent persons within their territory from cooperating with the United States, and they have established criminal sanctions for those who comply with United States law in violation of these "blocking" statutes. Among those which have adopted and, from time to time implemented such laws are the United Kingdom, the Federal Republic of Germany, Canada, Australia, and the Netherlands.

Comity should work both ways. We owe deference to other nations when their vital national interests are at stake and the conflicting United States interest carries a lesser weight. But other nations owe us, in turn, deference at least to the extent of working toward a compromise arrangement if our fundamental national interests are directly affected.

Of course, there will be unavoidable situations where two sets of interests conflict, each country viewing its own as supreme. Such situations provide a test of each nation's sense of comity, and perhaps its diplomatic skills as well.

But I see no such excuse for deliberately enacting "blocking" legislation solely to frustrate U.S. antitrust laws, without regard to the seriousness of the case of the national interest at stake. Blanket prohibitions by foreign governments against cooperation with U.S. investigations, by their nationals or even by U.S. citizens located in their territory, are not only inconsistent with comity but may also harm those who invoke prohibitions. Cooperating with investigations is the best way of bringing exculpatory information to our attention. Cooperation by a foreign firm or government is a significant factor influencing our prosecutorial judgment. Let me make clear to you that I deem our criminal investigation of the international uranium industry and our civil investigation of the international oil industry matters of fundamental United States interest.

We are obligated to do all that we reasonably can to prosecute foreign private cartels which have the purpose and effect of causing significant economic harm in the United States in violation of antitrust laws. To my mind there is a fundamental United States interest in not having our citizens pay substantially higher prices for imports because private firms get together and rig international markets. There is also a fundamental United States interest at stake when private businesses, although foreign, get together to injure and perhaps destroy an American competitor.

Of course, I do not hold the utopian view that all international markets must be perfectly competitive. I recognize that international markets structured by explicit agreements between duly authorized government officials may be legal under United States law. In some instances such agreements may be desirable or even necessary in terms of United States economic policy.

But there is a big difference between arrangements by governments to structure markets within their jurisdictions and private cartels getting together to fix prices and allocate markets worldwide, even where those cartels have tacit support from governments.

In summary, comity cannot be a principle which the United States is bound to respect when others have valid interests and yet does not apply to others when we have at least equally valid interests.

During my six months as Attorney General, I have had occasion to observe, in a way that perhaps few other government officials can, the importance of comity. I have been working closely with the National Association of Attorneys General, and in June I addressed that organization's meeting in Indianapolis. Later in the same week, I flew to Ottawa to meet with Canadian officials about matter of mutual concern in the field of justice.

In Ottawa, we discussed Canada's concern over the use by our police of "hot pursuit" that carries across the border into Canada. I have repeatedly pledged by cooperation to state Attorneys General, and I am sure those state Attorneys General who are near the Canadian border will reciprocate by cooperating with me in working to restrain border crossings by our law enforcement officers.

So, as I observed during that June week, comity is a principle that comes into play within our borders as well as outside. Unless our states cooperate with Washington, then Washington's ability to cooperate with other nations may be impaired.

We must practice at home what we call for abroad. I would like to mention a few things we are doing at the U.S. Department of Justice to buttress the spirit of federal-state comity:

We share antitrust grand jury information with states, where we have court permission to do so and where the state agrees to withhold action until the federal case is ended.

In matters involving the civil rights of patients or inmates in state institutions or prisons, we will give the state an opportunity to solve problems voluntarily before we file suit. If voluntary compliance falls short, we will make every effort to inform state officials before suing, so that they do not learn of the action from the news media.

We will continue our policy of deferring to a state in cases of dual jurisdiction, but we reserve the right to prosecute federally under civil rights laws if we feel state prosecution was insufficient.

We have helped to set up federal-state law enforcement committees in 22 states, and have instructed U.S. Attorneys to discuss prosecution policies with state prosecutors.

We are developing prison standards to help states meet requirements for such things as medical care and living space.

In a spirit of comity toward this audience, I will stop now by saying that comity is more than a legal principle. It is the expression of a civilized human being and a humane government—a policy of courtesy, of restraint, of civility, and of concern and sympathy for those with which we deal. That is the spirit I trust you will find at the U.S. Department of Justice today.

[The following information was referred to on p. 40:]

THE SECRETARY OF STATE,
Washington, D.C., July 25, 1977.

HON. DANIEL K. INOUYE,
U.S. Senate.

DEAR DAN: Subsequent to our July 13 meeting, I looked into your report that the Department of State had been unwilling to supply a witness to recent hearings on rate-cutting.

I have learned that prior to the Commerce Committee's two days of hearings on rebating in March a member of the Committee's professional staff, Richard Daschbach, called the Director of the Department's Office of Maritime Affairs, Richard K. Bank, to inquire informally about the possibility of a Department representative testifying at these hearings. In this conversation, Mr. Bank inquired whether the Department could usefully contribute to the hearings. He noted that the Department has no mandate in this area and has no precise information on rebating, but he offered to discuss possible State testimony if Mr. Daschbach determined it necessary. Subsequently, the Department heard nothing further from the Committee or its staff and assumed that the Committee had decided against asking a Department witness to testify. It would have been better if our people had followed up to see whether they could helpfully testify. I am satisfied, however, that Mr. Bank did not refuse to testify.

As promised, I am enclosing a paper which responds to your White Paper in greater detail than Mr. Katz and I were able to do during our July 13 visit. I hope it will be helpful.

With warm regards,

Sincerely,

CYRUS VANCE.

Enclosures.

COMMENTS ON "STATE DEPARTMENT WHITE PAPER"

The "White Paper" presents a misleading picture of the Department of State's activities in the maritime area. This paper reviews its major points.

The "White Paper" begins by stating that the Department of State failed to assist the Federal Maritime Commission in attacking the problem of illegal rebating. The allegation is puzzling, since investigation and control of rebating and other malpractices on the part of shipping lines is an enforcement function statutorily assigned to the FMC, and the Department has no mandate in this area. Information about such malpractices carried out by shipping lines does not normally come to the attention of the Department. Furthermore, the FMC never requested the Department's help in this effort; neither did the SEC, which the paper implies the Department also declined to assist. Nevertheless, the Department in no way condones violations of U.S. shipping laws and, in connection with rebating and other issues as well, has frequently stressed to foreign government representatives that their shipping lines must comply with U.S. laws.

The Department of State has also never resisted Coast Guard tanker safety proposals. It has, in fact, encouraged the Coast Guard to impose necessary requirements on vessels entering U.S. parts. The Department has made clear in

international discussions that the U.S. must reserve the right to act to protect its own interests when international approaches do not provide adequate remedies for such problems as tanker safety and pollution.

In the South American trades, the Department has been particularly active in countering discriminatory measures (such as cargo reservation schemes and fiscal incentives favoring national lines) enacted by governments in that region. Efforts to combat such practices have significantly ameliorated the adverse impact on U.S.-flag carriers and have assured U.S. carriers substantial participation in these trades. During the past year, the Director of the Department's Office of Maritime Affairs travelled to Argentina and Brazil with the Maritime Administrator. In both cases, the result of intensive negotiations was the nullification or retraction of measures which had threatened to squeeze U.S. carriers out of those trades. Similar success was achieved through Embassy representations in Chile in 1975–76.

The "White Paper" also suggests that the Department has not acted against disciminatory measures in the Philippines, when in fact the Department has worked closely with the FMC to counter these measures. Presidential Decree 667, an incentive scheme favoring Philippine flag vessels, was retracted after strong protests were lodged by the American Embassy. A more recent decree enacted subsequently has apparently not been implemented in U.S. trades because of strong U.S. Embassy representations. The Department has assured U.S. operators that if evidence materializes that this decree is being implemented in U.S. trades, it would protest strongly and work closely with other agencies to counter it.

The discussion of the U.S.-USSR Maritime Agreement (referred to as the "Soviet Grain Deal") fails to mention the substantial benefits which this agreement brought the U.S. merchant fleet and which had been requested by the U.S. maritime industry and maritime labor. It guaranteed substantial U.S. liner participation in U.S.-USSR bilateral trade. By requiring that one-third of grain cargoes be carried in U.S. vessels, it brought most laid-up U.S. tankers back into service, providing additional jobs for U.S. seamen. The assertion that the Department blundered by limiting the cargo reservation provisions to bilateral trade is puzzling. These provisions could not have been extended to other trades without violating international agreements and U.S. law. The Department has consistently worked closely with the Maritime Administration to ensure Soviet compliance with the agreement.

In discussing proposed legislation to control Soviet rate-cutting, the paper states that the Department "almost singlehandedly" stopped its passage. In fact, although the Department testified against S. 868 as introduced, it took the lead role within the Administration (and worked closely with Congressional staff and counsel for a leading U.S.-flag operator) in developing a bill which the Administration said it would support. It was after discussion with Senator Inouye during hearings and with his staff thereafter that this project was launched. Consideration of this bill was halted not by the Department but as a result of FMC Chairman Bakke's "Leningrad Agreement", which offered an alternative solution to the problem.

The opening of U.S. ports to East German vessels was a normal consequence of the establishment of diplomatic relations. To deny entry to vessels of a country with which we have diplomatic relations would be virtually unprecedented. The entry conditions granted to the East Germans (14 days advance request) are the least favorable granted to any Communist country, putting East German vessels in the same category as those of Bulgaria and the People's Republic of China.

Regarding FMC Chairman Bakke's "Leningrad Agreement", the Department did object to the way it was negotiated; the failure of Chairman Bakke to keep the Department and Embassy at Moscow sufficiently informed of his negotiations meant that they could not be related to other important aspects of U.S.-Soviet relations, including other maritime issues. The Department did not oppose the substance of the agreement and cooperated fully with the FMC in efforts to bring about its implementation.

Finally, the paper criticizes the Department for not notifying Congress that certain foreign countries permit rebating and have laws prohibiting the release of shipping documents to foreign authorities. The Department has made no attempt to withhold such information and would readily have informed the Congress in connection with any relevant proceeding before the Congress. In fact these laws have been well-known in shipping circles and among the U.S. agencies concerned. As noted, the Department has consistently stressed to foreign government representatives that foreign lines in U.S. trades must comply with U.S. shipping and antitrust laws.

[The following information was referred to on p. 46:]

QUESTIONS FOR THE DEPARTMENT OF STATE

Question 1. At the committee's hearings on rebating in March of this year, the president of the transportation institute, which is a non-profit research organization composed of 130 member companies, engaged in operating vessels in the nation's international shipping trades testified as follows (p. 45):

"Significantly, I think your invitation to the State Department was declined I wonder, sir, if the fact that they did not come indicates as it does to me, to the rest of you on the committee, that this is evidence of the State Department's concern, not of the American merchant marine or American national interests, but interests of the foreign-flag shipping companies.

". . . where there is something of a positive nature that is being done to protect American-flag interests and American shipping stability, the State Department is never reluctant to appear in opposition.

"I recall that they come forward with some alacrity with respect to the third-flag shipping bill. So is it not a consistent attitude that they are manifesting?"

Why do you suppose he said what he did?

Question 2. On July 21, the then chairman of the FMC, Mr. Bakke, wrote to the Assistant Secretary for Economic and Business Affairs expressing his hope that the department, through the U.S. delegate to the U.N. group of experts on international standards of accounting and reporting could transmit and support the FMC's proposal to that group of experts. The FMC's proposal reads as follows:

"That the group of experts in developing proposed minimum financial and non-financial items of information for reporting to governments by corporations, recommend that transnational companies certify annually (ideally, after an independent audit) whether they have maintained off-book accounts or have engaged in commercial practices that violated any law of any country in which they have done business during the reporting period. Should this suggested provision overlap other recommendations of the group, it would be most helpful if the report accompanying those recommendations could at least incorporate specific reference to, and express concern about, the particular problem of competitive practices by ocean common carriers that violate the laws of a member state in whose water-borne foreign commerce those carriers participate on either a bilateral or cross-trading basis."

(a) In order for the FMC to have the group of experts on international standards of accounting and reporting, consider its proposal, is it necessary to have the State Department transmit it? In other words, could the FMC have sent it directly to the group of experts?

(b) Did the department transmit the FMC's proposal as requested by Mr. Bakke?

(c) Did the department support the FMC's proposal? If not, please explain why?

Question 3. It has been suggested that the ultimate solution to the rebating problem may be a series of separate agreements or treaties between the U.S. and each of its trading partners. Would you comment on this approach.

Question 4. (*a*) Does the Department of State notify the FMC of the laws and policies of foreign countries with respect to rebating, and prohibition against the release of documents to foreign authorities?

(b) If not, should the department do so?

Question 5. (a) Does the Department of State participate formally or informaly in any proceedings or matters before the commission

(b) If not, should the department do so?

Question 6. Does the Department of State agree that the objective of U.S. shipping policy is to establish and maintain a strong merchant fleet owned by American citizens, operated by American crews, and fully capable of serving our international economic, military, and political commitments under all foreseeable circumstances

Question 7. Part of our shipping policy is, of course, regulatory and is embodied principally in the shipping act, 1916. Those provisions are administered by the federal maritime commission.

The regulatory part furthers the objective of our national shipping policy by seeking to assure that agreements and practices in the U.S. liner trades are not

detrimental to the commercial interests of the U.S. To that end, the shipping act seeks to preserve competition in our liner trades.

(a) Would you agree that if the provisions of the shipping act are unequally applied so that they discriminate against U.S.-flag carriers, to their detriment, that those provisions are not being used to preserve competition in our liner trades?

(b) If that is so, it follows, does it not, that the purpose of the Shipping Act, and the objective of our National Shipping Policy are being frustrated by the discriminatory application of the law?

Question 8. (a) What divisions or sections within the Department of State have responsibilities which affect our maritime industry, and our National Shipping Policy?

(b) Describe the activities and responsibilities of each of these entities.

Question 9. (a) Does the Department of State believe that rebating is wide spread throughout the U.S. liner trades?

(b) Does the Department of State believe that the Federal Government's efforts to remedy that situation must be increased?

Question 10. Is there any liaison, formal or informal, between the Department of State and the FMC with respect to those areas where each agency has some responsibility? If so please describe it, and whether it is on a continuing basis.

Question 11. For the record, would the Department please submit a memoranda of law and conclusion on the question of whether a foreign-flag common carrier by water may refuse to comply with an otherwise lawful subpoena *duces tecum*, etc. from a Federal agency requiring production of documents in its possession on the ground that disclosure would contravene foreign statutes or foreign policy?

Question 12. (a) In the Department's view does the port closing sanction in S. 2008 raise any legal or constitutional problem?

(b) If the port closing sanction were discretionary rather than mandatory under S. 2008, could the Department support it?

Question 13. On page 4 of your statement you say that in recent discussions with the department, foreign Government representatives have informed us that their governments are willing to enter into discussions with the Department of State with the aim of finding a satisfactory solution to the rebating problem.

(a) Can you tell the committee which foreign governments have approached the department?

(b) Did you inform the FMC in each case?

(c) Are the department and the FMC pursuing the matter? If so, please explain?

(d) Would it be realistic to try to solve the rebate problem by negotiating treaties or agreements on a case by case basis with our trading partners? What about "cross traders"?

Question 14. On p. 2 of your statement, you say that "the concerned agencies (including the Department of State and the FMC) should attempt to work with Congress to devise alternative procedures to facilitate foreign compliance with the FMC's request for information."

(a) Has the Department of State ever made such a recommendation to the FMC? If so, when, and what were the circumstances, and the result?

(b) Has the Department of State ever made such a recommendation to the Congress before now? If so, when, and what were the circumstances, and the result?

(c) If the Department of State has not previously made such a recommendation to either the FMC or the Congress, why is it making it now?

(d) Would the Department of State in consultation with other interested agencies submit to the committee a recommended alternative procedure to facilitate foreign compliance with the FMC's request for information.

This matter has some urgency in view of our timetable for S. 2008, so the committee would appreciate the inter-agency recommendation by the end of October. That gives you a little more than 2 weeks.

Question 15. On p. 2 of your statement, you say that in several countries laws or regulations are in force that forbid or restrict the release by companies of shipping documents to a foreign government, and that several of these laws were enacted in direct response to previous attempts by U.S. regulatory agencies to investigate foreign companies' and shipping conferences' attempts which many governments considered an unwarranted effort to extend U.S. jurisdiction beyond U.S. territory in violation of their rights as sovereign states.

(a) Do you agree that attempts by the FMC to investigate foreign companies and shipping conferences are an unwarranted effort to extend U.S. territory in violation of the rights of other sovereign states?

(b) If so, how can the FMC effectively administer and enforce the provisions of the Shipping Act, 1916?

Question 16. On p. 3, you state that the department has "indications" that "some countries" would bar all U.S. ships from their ports in retaliation for the banning of vessels of a line of their nationality from U.S. ports.

(a) Specifically, what are the "indications" the department has?

(b) Specifically, which countries would bar all U.S. ships from their ports in retaliation for S. 2008?

Question 17. On P. 3, you state that the department "fears that the effect of implementing the sanctions in S. 2008 would hurt U.S. operators simultaneously—and on a broader scale than our actions are affecting their foreign competitors."

(a) Please explain the basis and reasons for the department's fear?

(b) What is the "broader scale" to which you refer?

Question 18. On P. 4 of your statement you say that the department "believes that the only way to obtain the necessary documents if to negotiate a regime of cooperation with other major shipping nations."

(a) has the department done this?

(b) has the department consulted with the FMC? If so, please give the specific circumstances and details.

Question 19. According to your statement, the department fears that the effect of implementing the "port closing" sanction in S. 2608 would hurt U.S. operators on a broader scale.

S. 2083, the oil pollution and liability legislation currently spending in the Senate provides that the Secretary of the Treasury may deny entry to any port or place in the United States or navigable water to any oil cargo vessel which does not produce a valid certificate of compliance with treasury regulations relating to adequate financial responsibility for oil spills.

Does the Department of State have similar reservations about the "port closing" provision in S. 2083?

RESPONSE OF RICHARD K. BANKS, DIRECTOR, OFFICE OF MARITIME AFFAIRS, DEPARTMENT OF STATE

Answer 1. Mr. Brand's comments seemed to reflect a misunderstanding of the Department of State's role regarding both the March 1977 rebating hearings and the Third Flag Bill.

Regarding the rebating hearings, Mr. Richard Daschbach, then a member of your Committee's staff, called me prior to the Committee's March hearings on rebating and inquired informally about the possibility of a Department representative testifying at those hearings. In this conversation, I questioned whether the Department could usefully contribute to the hearings, noting that the Department has no mandate in this area and no precise information on rebating. I did however offer to discuss possible Department of State testimony if Mr. Daschbach believed it necessary. Subsequently I called Mr. Daschbach to inquire whether the Committee wanted State Department testimony and was informed that the Committee had decided against asking a Department witness to testify. My initial conversation with Mr. Daschbach was in no way a refusal to testify but rather an informal estimate of how useful we thought such testimony would likely be.

Regarding the "Third Flag Shipping Bill," while the Department testified against S. 868 as introduced, it took the lead role within the Administration in developing a bill which the Administration could support. It was after discussion with Senator Inouye during hearings and with his staff thereafter that this project was launched. Congressional consideration of the bill was halted not by the Department of State but as a result of FMC Chairman Bakke's "Leningrad Agreement," which offered an alternative approach toward solving the problem.

Answer 2. The Department of State did not transmit Mr. Bakke's proposal to the Group of Experts of the U.N. Center on Transnational Corporations. Assistant Secretary of State for Economic and Business Affairs Julius L. Katz wrote to Mr. Bakke explaining that the Group of Experts is a group of fourteen individuals acting in their private capacities, rather than as instructed government representatives.

The U.N. Secretariat indicated that as a matter of general policy it would regard any attempts by governments to influence the deliberations of private groups of experts as unwarranted interference with the activities of a private experts group. Thus it would have been inappropriate for the U.S. Government to inject Mr. Bakke's proposal into this group.

In any event, there were substantive diffculties in acting on issues relating to rebating in a group whose limited mandate was to make recommendations on the problem of non-comparable accounting and reporting data relating to the activities of transnational corporations.

Mr. Katz did promise that if in the future the United Nations or any of its bodies takes up the question of commercial malpractice, the Department of State would be in touch with the Federal Maritime Commission. We are prepared to discuss with the FMC the possibilities for raising this issue in the United Nations.

The Department appreciated the fact that Mr. Bakke chose to forward his proposal through, and with the concurrence of, the Department of State.

Answer 3. We believe that some type of understanding between the United States and its trading partners is essential to a solution in the rebating problem. We intend to pursue such an understanding through discussions with our trading partners. At this point, however, we do not yet know whether separate bilateral agreements or treaties will be necessary or whether less formal understandings which could be equally effective, can be achieved.

Answer 4. The Department of State would certainly notify the Federal Maritime Commission of any new laws or policies of other governments relating to rebating or restricting the release of shipping documents to foreign authorities. However, the laws of other governments which currently restrict the release to U.S. authorities of documents located abroad have been in force since the early or mid-1960's and are well known in shipping circles and among the U.S. agencies concerned, including the Federal Maritime Commission.

Answer 5. The Department of State has not participated as a party in any proceedings before the Federal Maritime Commission. Where matters before the Commission have particularly significant foreign policy implications, however, the Department has on occasions communicated by letter with the Chairman of the Commission. A recent example would be the letter from Assistant Secretary Katz to then-Chairman Bakke concerning pooling and equal access agreements in Latin America. In that letter the Department expressed its concern over the possible diplomatic consequences of a failure to renew a number of such agreements in our Latin American trades.

Answer 6. Yes. Moreover, the Department believes that U.S. shipping policy should seek to ensure efficient and economical transportation services to U.S. exporters, importers and consumers.

Answer 7. (a) As pointed out in the question, administration of the regulatory provisions of the Shipping Act of 1916 is the responsibility of the Federal Maritime Commission. The Department of State does not agree with any suggestion that the Commission discriminates against U.S. flag carriers in the discharge of these responsibilities.

(b) If, however, for any reason the regulatory provisions of the Shipping Act are being applied more stringently to U.S. carriers, then clearly U.S. carriers are disadvantaged to some degree, and competition is not being protected to the extent envisaged in the Act. If such is the case, then the purposes of the Act are not being met.

Answer 8. (a) The following offices within the Department of State have responsibilities affecting the maritime industry: (1) the Office of Maritime Affairs; (2) the Office of Soviet Union Affairs in the Bureau of European Affairs; and (3) the geographic bureaus of the Department of State.

(b) The Office of Maritime Affairs is the focal point for all shipping-related issues within the Department of State. Among other things, the office is responsible for diplomatic efforts to counter foreign discrimination against U.S. carriers, representation of the U.S. in international bodies dealing with shipping, such as UNCTAD, OECD, and IMCO, and (in cooperation with other agencies involved) development of U.S. international shipping policy. The Office of Soviet Union Affairs represents the Depatrment of State in interagency discussions relating to control of access to U.S. ports by Soviet and other Communist vessels. The various geographic bureaus of the State Department have the responsibility of looking at shipping policy in the context of our overall foreign relations with other countries and regions. The Office of Maritime Affairs works

closely with the appropriate geographic bureaus when dealing with bilateral shipping problems.

Answer 9. (a) We are of course familiar with the disclosures made in recent investigations by the SEC and FMC regarding the extent of rebating. However, the Department has no independent information or knowledge regarding the pervasiveness of rebating.

(b) If rebating is indeed widespread in U.S. liner trades, then the Department of State believes that the Federal Government should increase its efforts to eliminate the practice, so long as it is prohibited by U.S. laws.

Answer 10. The Department of State's Office of Maritime Affairs is in daily contact with both senior and working-level officials of the FMC. The Department of State recognizes and respects the FMC's stautory mandate to regulate liner operations in the U.S. foreign trades. Conversely we are confident that the FMC recognizes the Department of State's overall responsibility for foreign affairs and is conscious of the impact which its regulatory activities can have on U.S. foreign relations. The relationship between the Department of State and the FMC is excellent and we anticipate that there will be continuing cooperation on all issues where both agencies have a responsibility.

Answer 11. The question of whether inability to comply wtih a valid subpoena for documents located in a foreign country because of foreign laws or policies against their disclosure is a valid defense for non-compliance must be answered by the courts in light of the circumstances of the particular case. We believe that the courts generally would not find the existence of foreign governments' policies against compliance to be a defense, where compliance would not subject the party to any sanction. However, we believe that the courts might decline to impose significant sanctions on a party who failed to comply with a subpoena if compliance would expose the party to significant penalties under the laws of a foreign country.

Any court deciding an issue of this type would have to balance the sovereign interests of both countries in light of the principles of international comity. Section 40 of the American Law Institute's Restatement of the Law, Second, Foreign Relations Law of the United States, sets forth the principles which may be applied by the courts in making such a judgement.

"Where two states have jurisdiction to prescribe rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider in good faith moderating the exercise of its enforcement jurisdiction, in the light of such factors as

"(a) vital national interests of each of the states,

"(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,

"(c) the extent to which the required conduct is to take place in the territory of the other state,

"(d) the nationality of the person, and

"(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state."

Answer 12 (a) As suggested by the previous answer, the Department believes that the mandatory suspension of a line's access to United States ports because of the line's non-compliance with an F.M.C. subpoena, where compliance would subject the lie to sanctions under foreign law, would raise serious questions of international law and comity. Whether such a sanction would be upheld by the courts, however, is a matter which could be resolved only through judicial consideration of particular cases. A party subjected to this sanction might argue that it constituted a denial of due process, although we do not know if this argument would prevail.

(b) Making the port closing sanction discretionary would obviously leave the Commission much greater flexibility to resolve particular cases in ways consubject the line to sanctions under foreign law, would raise serious questions of to believe that this sanction should not be applied in any case where a party's non-compliance stemmed from the requirements of foreign laws, or where the party made a good-faith effort to comply with the F.M.C.'s order.

Furthermore, we are concerned that use of the port closing sanction, even on a discretionary basis, would be more likely to produce confrontations with our major trading partners than to achieve the purpose for which it was designed. The Department therefore believes that the professed willingness of our trading partners to negotiate a solution to the rebating problem should be explored before consideration is given to this sanction.

Answer 13. (a) The governments which have informed us that they are willing to enter into discussions with the aim of finding a satisfactory solution to the rebating problem are Belgium, Denmark, Finland, The Federal Republic of Germany, Italy, Japan, The Netherlands, Norway, Sweden, and the United Kingdom.

(b) The Department of State has provided the Federal Maritime Commission with a copy of the diplomatic note in which these governments expressed their willingness to enter into such discussions.

(c) We have asked the FMC to provide us with a list of those countries with which it believes discussions on solving the rebating problem should be initiated. We have also informed the ten governments that since the rebating problem is a matter of serious concern to the U.S. Government, we will hold such discussions soon. We will set mutually agreeable dates for discussions as soon as we have worked out a definitive list of countries with the FMC.

(d) We will attempt to reach agreements or understandings with the governments whose national flag operators participate in those trades where the FMC believes rebating is prevalent, including both bilateral and cross-traders.

Answer 14. The Department has not previously made this recommendation to either the FMC or the Congress. The Department has not previously appreciated the need for additional means to enable the FMC to control rebating. In July of this year, for instance, the FMC described its malpractices investigation to the Department as a firm and sustained effort which was moving along at a brisk pace, noting that two cases had been referred to the Department of Justice for prosecution and that there had been settlements of other cases. The FMC did not request the Department's assistance in connection with those efforts. The current hearings, however, have made it clear that a serious problem exists and that we may be able to assist hte Commission with its efforts. We hope and intend to do so.

As indicated, we have told the Commission of our willingness to work with them in conducting negotiations with foreign governments. We intend to pursue discussions with our major trading parties to explore their professed willingness to cooperate in finding a solution to the rebating problem. If such discussions are not productive, we will have to formulate alternative procedures for procuring foreign compliance with the FMC's request for information, in light of the outcome of our negotiations.

Answer 15. We do not agree that attempts by the FMC to investigate foreign shipping lines and conferences are an unwarranted effort to extend U.S. jurisdiction in violation of the rights of other sovereign states. We must, however, face the fact that some other goverments hold this view. Therefore we believe that the best way to enable the FMC to enforce the provisions of the Shipping Act is to gain the cooperation of the foreign governments concerned through negotiations.

Answer 16. I have been told by senior shipping officials of some of the U.S.'s major trading partners that their governments would bar U.S. vessels from their ports in retaliation for the banning of vessels of their nationality from U.S. ports. We cannot predict which countries would actually bar all U.S. vessels from their ports in retaliation for implementation of the mandatory sanctions in S. 2008; however, we do know that Part III of the British Merchant Shipping Act of 1974 provides enabling powers (subject to parliamentary approval) for the British Government to take such action.

Answer 17. The basis of our fear is that while the sanctions in S. 2008 would apply only to the vessels of a particular line, rather than to all vessels flying the flag of a particular country, retaliation would probably apply to the vessels of all U.S. lines calling at the ports of the country in question. Furthermore, we are concerned by the long-term damage to U.S. carriers which might result from the foothold gained by third flag carriers in trades where this pattern of sanctions and retaliation had occurred.

Answer 18. As noted in our answer to question 13 the Department of State has informed the ten governments which have expressed willingness to hold discussions on rebating that we will hold such discussions in the near future. We have also asked the FMC to advise us which governments it believes it would be profitable to pursue such discussions with, so that we can work out a definitive list.

Answer 19. The Department does not have similar reservations about the port closing provisions of S. 2083. Foreign vessel operators can comply with these Treasury regulations without violating the laws of their own countries.

[The following information was referred to on p. 51:]

DEPARTMENT OF THE TREASURY,
Washington, D.C., October 28, 1977.

Hon. DANIEL K. INOUYE,
U.S. Senate,
Washington, D.C.

DEAR SENATOR INOUYE: I regret the delay in responding to the written questions you submitted for Treasury Department response when I appeared before your Subcommittee earlier this month. Answers to the questions were prepared well in advance of the date you set as the deadline, but they were not forwarded promptly because of a mixup within the Department.

In response to your request for substitute language on the immunity provision of S. 2008, we suggest the following changes:

Paragraph (d)(1)(B) should read: "during the period beginning with the date of enactment and ending one year thereafter, such person who committed such act has made a good faith disclosure to the Commission without knowledge that such person or act is the subject of an investigation by any agency of the Federal Government".

The next paragraph, beginning with "Notwithstanding any other provision of law", should be deleted.

We have coordinated this language with the Department of Justice. We understand that Justice is communicating separately with your Subcommittee to present its official position.

Sincerely,

GARY C. HUFBAUER.

DEPARTMENT OF THE TREASURY,
Washington, D.C., October 27, 1977.

HON. DANIEL K. INOUYE,
Chairman, Merchant Marine and Tourism Subcommittee, U.S. Senate, Washington, D.C.

DEAR SENATOR INOUYE: In the absence of Deputy Assistant Secretary Gary C. Hufbauer, I am forwarding to you responses to written questions which you submitted to Mr. Hufbauer on Wednesday, October 12. As you will recall, Mr. Hufbauer appeared before your Subcommittee on Merchant Marine and Tourism to present the Treasury Department's views on S. 2008, a bill to amend the Shipping Act of 1916.

Please do not hesitate to contact us if the Treasury can be of further assistance to the Subcommittee on this matter.

Sincerely,

GENE E. GODLEY,
Assistant Secretary (Legislative Affairs).

Enclosure.

Question. On page 1 you state that the "Treasury seeks to assure that general economic policies are properly considered in the design of measures aimed at the problems of a particular sector."

What are our "general economic policies?

Answer. In the context of S. 2008, the applicable general economic policy is Treasury's support of open competition and its opposition to price-setting cartels. We take this position because cartels tend to encourage inefficient use of resources in our economy by distorting prices and encouraging the development of excess capacity. Furthermore, cartels generally result in artificially high prices, which works against our overall policy goal of restraining inflation.

Question. The objective of U.S. shipping policy is to establish and maintain a strong merchant fleet owned by American citizens, operated by American crews, and fully capable of serving our international economic, military and political commitments under all foreseeable circumstances.

Does this objective conflict with "our general economic policies, and our general economic policy principles?"

Answer. We have no reason to believe that a highly efficient, modern U.S. fleet cannot compete effectively in international markets under conditions of generally free competition. In that sense, no conflicting objectives are present.

Further, if the U.S. fleet operating under competitive conditions is too small to meet our military and political commitments, the Treasury believes that the correct solution would involve appropriate operating and capital subsidies, not cartel rate fixing. The liner conference system as it has existed since 1916 clearly has not prevented drastic reductions in the size of our merchant marine.

Question. On pages 3–4 of your statement, you say that "as economists, we are not surprised that illegal rebates . . . have sprung up in response to liner conference agreements, which often result in higher prices than the market will support. If prices are artificially high, someone will try to undercut them, either through legal or illegal actions. *This is not an apology for rebates, but an attempt to explain why they occur.*"

I find your explanation somewhat extraordinary inasmuch as you say at p. 3 that you "do not claim to be experts on maritime affairs." Are you aware that most of the experts in the shipping industry say that the major cause of rebating in our liner trades is "overtonnage" which is brought about by our policy of "come one, come all" to our ocean trades? (See rebate hearings March 1977)

Answer. We are aware that rebates result from "overtonnage" in our ocean trade. In fact, that is exactly our point. The liner conference system encourages the construction of overtonnage and as long as this market condition exists, price cutting will probably occur. Price cutting or rebating will end only if a reasonable balance is reached between supply and demand of shipping capacity.

Question. Inasmuch as your explanation of why rebating occurs in our trades is based on your expertise as economists (pp. 3–4) would you please supply for the record an expert memorandum to support your explanation of why rebating occurs?

Answer. This question requires a response virtually identical to that given to the previous question. If marketplace forces are allowed to operate freely, supply of and demand for a commodity will meet at a certain price. If the price is held at a lower level through government intervention, shippers will most likely offer less capacity because they will be unable to meet their costs at the lower price. On the other hand, if the government arbitrarily pegs prices at a level higher than the market equilibrium price, shippers will offer more capacity because they see the possibility of higher profits, and overtonnage will result. The natural response of shippers to this overtonnage would be to cut prices to fill their capacity. If the government forbids them from doing so, price cutting in the form of invisible rebates is the probable result.

Question. On page 3, you state categorically that "attempts to reduce or restrict competition inevitably lower national welfare in the aggregate and contribute to wasteful inefficiencies in our economy."

In the area of domestic telecommunications the Bell System has a legal monopoly in the "public message service", i.e., local and long distance telephone service. Are you saying that the Bell System, which is a legally sanctioned monopoly for public message service, "inevitably lowers national welfare in the aggregate and contributes to wasteful inefficiencies in our economy?"

Answer. Of course technology in a very few industries, such as public utilities, leads to "natural monopolies". It would not make sense for example, to have competing electric utilities build parallel and duplicate sets of generating plants and transmission wires. "Natural monopolies" must of course be regulated by the government. But we do not believe that the technology of ocean shipping in any way dictates a "natural monopoly." Ocean shipping should operate on competitive principles like the great majority of sectors of the American economy. Indeed, we are now experimenting with greater competition even in the telecommunications sector in the United States.

Question. Are you familiar with the Congressional Committee referred to as the Alexander Committee, and its report and recommendations which were published in 1914?

Answer. Yes.

Question. Are you aware that the Shipping Act of 1916, which established the basic pattern of federal regulation of the ocean freight system—including limited acceptance of the conference system and limited immunization from the antitrust laws—implemented the recommendations of the Alexander Committee?

Answer. Yes.

Question. In other words, our National Shipping Policy recognizes and accepts the open conference system accompanied by government supervision. Do you therefore agree that the solution to the rebate problem must come within the context of our open conference system?

Answer. We support a solution that provides efficient service at an economically justified cost. As was spelled out in our testimony, we have double whether this can be achieved in the context of the open conference system. A step in the right direction, however, might be to modify the current system by prohibiting dual rate contracts or by allowing conference members some freedom to set shipping charges independently.

Question. On page 5 you state that closing our ports to foreign liners as proposed in S. 2008, could result in retaliation against U.S. flag liners. Inasmuch as the ocean trades of the U.S. are the most lucrative and sought after in the world, do you believe that other countries would retaliate against the U.S.?

Answer. Yes. We are concerned that other countries might retaliate against our shipping. As the Department of State pointed out in testimony before your Subcommittee, U.S. lines do carry substantial amounts of cargo on certain routes. Our concern is that successive rounds of port closings could interrupt the flow of international trade, which would not be in our or our trading partners' national interest. We think other penalties, such as much higher monetary fines, would be equally efficient. Beyond this, as our testimony states, we are not convinced that any enforcement effort will be able to stamp out rebating as long as shipping rates are held at levels higher than the market will bear.

Question. On page 6 you state that the amnesty provision in S. 2008 is far too broad, and that you support the Justice Department in favoring a more limited grant of immunity. In its original testimony submitted to the committee on September 28, 1977, the Department of Justice recommended the following "use immunity" in lieu of the amnesty provided in S. 2008:

"Such a good faith disclosure to the commission or information obtained by the exploitation of such good faith disclosure shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement."

Question. Would this provision be acceptable in place of the amnesty provision in S. 2008?

Answer. No.

Question If not, please submit a draft provision which would be acceptable to the Treasury, and also achieve the purpose of the amnesty provision in S. 2008 i.e., "Encourage everyone who has been involved in rebating to come forward and disclose the nature and extent of their activities in order to assist the FMC in acquiring the necessary information to make appropriate recommendations to the Congress to solve the rebating problem."

Answer. We are consulting with the Justice Department on acceptable substitute language. We will forward the draft to you as soon as it is completed.

[The following information was referred to on p. 62:]

QUESTIONS FOR SEA-LAND AND THEIR ANSWERS

Question 1. In response to S. 2008, I have stated the legislation is in no way intended to abrogate or affect the FMC/Sea-Land agreement and the bill so provides. Do you believe this provision of the bill does what I intended it to do?

Answer. Yes.

Question 2. Paragraph 9 of the FMC/Sea-Land settlement provides:

"In the event of any change of law or the circumstances at any time during the terms of the agreement, Sea-Land has the right to petition the Commission from modification or mitigation of any requirements of the agreement."

Would it be Sea-Land's intention to cite enactment of S. 2008 as an event or change of law on which to base a petition to the FMC or modify or mitigate the settlement agreement?

Answer. It is not Sea-Land's intention. See Mr. Hiltzheimer's testimony.

Question 3. It has been suggested the ultimate solution to the rebating problem may be a series of separate agreements or treaties between the United States and its trading partners. Would you comment on this approach?

Answer. Diplomatic notes are marvelous exercises in platitudes. The present "governments note" that the State Department has submitted for the record dated 27 September, 1977 is the note from the Governments of Denmark, Finland, Germany, Italy, Japan, the Netherlands, Norway, Sweden and the United Kingdom, which refers to he bill S. 2008 and is intended to secure a permanent solu-

tion to rebating practices in the U.S. foreign maritime trade. The note goes on and says the Governments are sympathetic, but the Governments are concerned over some of the provisions. The note then says, should any of the above-mentioned governments elect to exercise their right in international law to prohibit their carriers from providing material or information located within their own jurisdiction, they would regard the suspension of tariffs and denial of entry to ports as an "unreasonable and unjustified response". The note then goes on and states: "While they are willing to cooperate to end the unfair and discriminatory trading practices, it would have to be compatible with the law and practices of both sides." First; the governments disapprove of the practices to which the bill is directed. Second; their own law and commercial practices differ from those applied in the U.S.A. There is no agreement to produce documents.

What does this all mean? If rebating is unlawful in the U.S.A., and if commercial practices in those countries is different—then rebating is probably legal there. If it is legal there, then they are not likely to view rebating as unfair and discriminatory and are not likely to take any action after discussion.

Negotiation of international agreements takes a great deal of time. Success in the negotiations requires leverage. The United States does not have leverage. S. 2008 will provide it. The United States does not have the time without S. 2008. Unless the United States has a "big stick" in its hand, separate trade agreements or treaties or the attempt to enter into them will be a total waste of time. The State Department has totally failed, and although it has filed statements with the Committee that are full of promises and conjectures, again, these are platitudes and do not offer any solution to the problem. The United States must have a "big stick" to be successful.

Question 4. Would Sea-Land support S. 2008 even if it is not amended to mandate the right of independent action within the conferences?

Answer. Yes. But it believes the right of independent action will assist in the effectiveness of the legislation.

Question 5. The FMC in its testimony recommends that amnesty be conditioned upon full disclosure of all the names of persons receiving or paying the rebates in question. Would you comment on the Commission's recommendations?

Answer. It is the feeling of the company the information should be available to the FMC, but it does not necessarily have to be filed with the FMC, although its filing with the FMC would give a greater protection under the Freedom of Information Act, and as long as it was held to be free and not subject to disclosure under the Freedom of Information Act, Sea-Land would not find a problem in such full disclosure.

Question 6. In its original testimony submitted on September 28, 1977, the Department of Justice recommended the following use immunity in lieu of an amnesty provision: "Such good faith disclosure to the Commission or information obtained by exploitation of such good faith disclosure shall not be used against any person in any criminal case except for prosecution for perjury or for giving a false statement."

In your view, would this provision be more likely to achieve the purposes of amnesty provided in S. 2008; that is, encourage everyone who has been involved in rebating to come forward and disclose the nature and extent of their activities in order to assist the FMC in acquiring the necessary information to make appropriate recommendations to Congress to solve the rebating problem?

Answer. We do believe ths language would help the desired intent of the legislation. However, one of the great problems would be a clear statement to the record that this language would also apply to Title 18, section 371 and 1001, so that these two statutes could not be used by prosecutors to reach out beyond the Shipping Act as a result of the disclosures to threaten the charge of felonies simply to get a conviction out of the disclosure. Unless these two statutes, 371 and 1001 of Title 18 U.S.C., are covered by the language, there would be little reason for anyone coming forward.

Question 7. Do you believe some sort of amnesty provision is necessary for the purposes of S. 2008?

Answer. Sea-Land believes without a form of amnesty provision being provided, no carriers will be forthcoming and the stonewalling will continue. Why should a carrier come forward, make a disclosure, pay a penalty, and then be subject to criminal prosecution under § 371 or the aforementioned § 1001? It is that we believe for the statute to be successful and for the information to be made available to the Commission the amnesty provision is absolutely essential to achieve the purposes of the legislation.

[The following information was referred to on p. 82:]

QUESTIONS FOR THE FEDERAL MARITIME COMMISSION AND THEIR ANSWERS

Question 1(a). In what kinds of FMC proceedings and other matters within the Commission's jurisdiction and responsibility does the Department of Justice participate?

Answer 1(a). The Department of Justice has intervened in a number of Commission proceedings involving section 15 agreements and dual rate applications (section 14(b)). Although the Department of Justice has not intervened in any proceedings which are solely concerned with violations of sections 16, 17, 18, or 44 of the Shipping Act, 1916, attorneys from the Department of Justice have informally expressed some interest in rate proceedings involving carriers in the domestic, non-contiguous trades.

Question 1(b). Would you describe the Department's role? For example, is it formal or informal; is it advisory, supportive, or adversary, vis-a-vis the FMC?

Answer 1(b). The Department of Justice has formally intervened in Commission proceedings and has generally taken an active role in the development of the record through discovery and cross-examination of witnesses. However, it has not sponsored witnesses in support of its position. The Department of Justice consistently opposes all conference control of ocean freight rates and practices.

Question 3(a). In your view, has the Department of Justice's participation in proceedings and matters helped or hindered achievement of the objectives of the Shipping Act, (i.e. assuring that agreements in the U.S. liner trades are not detrimental to the commercial interests of the U.S.), and of our national shipping policy (i.e., to establish and maintain a strong merchant fleet owned by American crews, and fully capable of serving our international economic, military, and political commitments under all foreseeable circumstances)?

Answer 3(a). In our view, participation by the Department of Justice has been generally helpful in determining where the public interest lies in such proceedings. Any agreement which involves anticompetitive activity which, without Commission approval, would be *per se* violative of the anti-trust laws of the United States, must be justified by a serious transportation need, an overriding public benefit or a valid regulatory purpose. The Supreme Court, in *Federal Maritime Commission* v. *Svenska Aktiebolaget Linien*, 390 U.S. 238 (1968) requires that substantial evidence be brought forward to demonstrate one of these factors before the agreement can be found not to be contrary to the public interest under section 15 of the Shipping Act, 1916.

Since approval of section 15 Agreements bestows immunity from the anti-trust laws which embody a strong national policy favoring free competition, the Department of Justice, as a protestant or intervenor in our proceedings, generally takes a position against approval of any such *prima facie* anticompetitive agreement. As long as the *Svenska* test applies, therefore, the Department of Justice's role in Commission matters pertaining to agreements is justified by national policy, the Shipping Act and the Commission's Rules of Practice and Procedure which provide for protests of agreements and intervention in formal proceedings. To the extent that a hearing is necessary for approval of an agreement under section 15, as interpreted by the D.C. Court of Appeals in *Marine Space Enclosures, Inc.* v. *Federal Maritime Commission*, 420 F.2d 577 (1969), the Department of Justice serves a useful purpose in developing the record in greater detail, especially on the issue of the anticompetitive effect of the proposed agreement.

Where the anticompetitive impact of a proposed agreement outweighs any transportation need, regulatory purpose, or public benefit, of course the agreement would be detrimental to commercial interests of the United States and it will not be approved.

Question 4. (a). Is there any liaison, formal or informal, between the FMC and the Department of Justice with respect to those areas where each has some responsibility; and if so, please describe it?

Answer 4(a). Our most frequent contact with the Department of Justice is the receipt of requests for investigation and hearing with respect to agreements filed for Commission approval pursuant to section 15 of the Shipping Act, 1916. Appropriate consideration is given to its comments and requests, the same as to those submitted by any concerned party.

However, this does not preclude cooperative activities between the Department of Justice and this agency. For example, we received a request from the

Department of Justice on June 28, 1977 in connection with a grand jury investigation of practices in the ocean shipping industry that may constitute antitrust law violations. The request was for documents (copies of all agreements filed with the FMC from January 1, 1972 to mid-1977 in the U.S. Europe trade and copies of minutes of meetings of all conferences and ratemaking agreements in that trade) which were essential to the investigation. The documents were made available.

Question 4(b). Between the FMC and other Federal Agencies; and if so, please describe it?

Answer 4(b). (1) The Interagency Committee on Intermodal Cargo is made up of participants from DOT, ICC, CAB and FMC. The committee works on a more formal basis, meeting monthly to discuss intermodal issues as they arise.

(2) Contact is maintained with the ICC regarding intermodal tariffs. These tariffs in the foreign commerce of the United States must be filed with both agencies. Accordingly they have to meet the filing requirements of both agencies and some coordination is necessary between the two agencies to bring tariff regulations into harmony.

(3) The Agency for International Development makes frequent use of our tariffs and also requests rate quotations.

(4) The Department of Agriculture also uses our tariffs, requests rate quotations and information covering other transportation services included in tariffs filed with us. This is primarily with respect to the export of agricultural products financed by loans from the Department of Agriculture.

(5) The Military Sealift Command is a frequent participant before the Commission in matters involving rates on military cargo. They have participated in the past in both rulemaking and adjudicatory proceedings involving such matters in both the foreign and domestic offshore trades.

The Commission has recently maintained informal contact with various agencies such as the Central Intelligence Agency, the Departments of Defense and State, the Maritime Administration and the Library of Congress on the broad subject of the Soviet Merchant Marine. The information accumulated through such liaison has been statistical in nature and is used by the Commission to keep abreast of the penetration and potential penetration of Soviet liners into our foreign trades.

Question 5. (a). Does the Department of State assist the FMC in the Commission's efforts to attack rebating in our liner trades?

Answer 5(a). The Department of State has been of assistance to the Federal Maritime Commission in a wide range of regulatory efforts. Most directly, the Department of State has been able to determine for us commercial and economic situations as they exist in foreign countries. In this way, they have given us valuable background information which permits us to understand the competitive climate that may exist in a particular trade or in a particular area. This background information is useful in anti-rebating activities of the Commission. State, however, is not in a position to directly assist us in dealing with rebates because the diplomatic nature of their mission makes it impossible to actively pursue evidence of malpractices.

Question 5. (b). If so, do you believe its assistance is adequate, or could it do more?

(c) If not, should the Department be assisting the Commission; and what could the Department be doing?

Answer 5(b) and (c). At present, we enjoy a cooperative and professional relationship with the Department of State. Where possible, and consistent with their diplomatic role, they have not failed to cooperate in our regulatory activities.

Question 6. (a). Does the Department of State notify the FMC of the laws and policies of foreign countries with respect to rebating, and prohibition against the release of documents to foreign authorities?

(b) If not, should Department do so?

Answer 6(a) and (b). Over the years, the Department of State has generally kept the FMC apprised of foreign laws and policies affecting shipping. We have had comprehensive country-by-country reports on foreign promotional decrees and on foreign prohibitions against the release of documents to U.S. authorities. Upon request, we have been given briefings on foreign statutes that prohibit rebating.

Question 8. Recently, in the trade press (The Journal of Commerce, September 22) I noted that you wrote to the Assistant Secretary of State for Economic

and Business Affairs that you "clearly recognized that it is not the role of the Federal Maritime Commission to participate in government-to-government negotiations which relate to matters of national maritime policies dealing with the promotion of the merchant marine. Such matters are within the jurisdiction of the Department of State, the Maritime Administration and perhaps other concerned agencies."

(*a*) Assuming the accuracy of the statement attributed to you, do you see any inconsistency between your position and the Commission's mandate to pursue the objectives of the Shipping Act (i.e., assuring that agreements in the U.S. liner trades are not detrimental to the commercial interests of the U.S. by preserving competition in these trades)?

Answer 8(a). I see no inconsistency between my intention not to participate in government to government negotiations relating to the promotion of the U.S. Merchant Marine and the Commission's mandate under the Shipping Act, 1916. On the contrary, I think that to participate in such negotiations could infringe upon the jurisdiction of other agencies and endanger the impartiality required of this agency in its regulatory functions.

In assuring that agreements in the U.S. liner trades are not detrimental to the commercial interests of the U.S., the FMC makes certain that such agreements work no disadvantage or hardship on any class or nationality of carrier. Furthermore, it is a Commission policy, derived in part from its own interpretation of Congressional intent and in part from the Supreme Court ruling in the *Svenska* case, to asure that agreements are no more anticompetitive than is necessary to achieve the legitimate and desirable purposes of the Shipping Act, i.e. to eliminate destructive and disruptive competition and to promote stable rates and operating conditions in the U.S. foreign and domestic offshore trades.

Question 8. cont. What will the Commission do in those cases where foreign carriers in our liner trades which are state-owned are engaging in anti-competitive practices?

Answer 8. cont. Insofar as the granting of antitrust immunity is concerned, we shall apply the same standards we would apply to agreements between non-state-owned carriers. If, of course, the state-owned carriers refused to abide by our laws, then we would be forced to refer the matter to the appropriate Federal agency for action. In the case of anticompetitive practices between state-owned carriers operating in our liner trades, under present law the FMC plans to take no different action with regard to such carriers that it would take with respect to any other carriers subject to its jurisdiction. Where state-owned carriers have engaged in anticompetitive practices not legalized by the FMC, then we shall take whatever setps are appropriate to the case at hand. The Commission's General Order 33 contains regulations issued pursuant to section 19 of the Merchant Marine Act, 1920 to adjust or meet conditions unfavorable to shipping in the foreign trade of the United States. Among other things, this General Order provides that upon the filing of a petition or on its own motion concerning such matter, the FMC will notify the Secretary of State and may request that he seek resolution through diplomatic channels.

Question 9. (*a*) Are you aware that the Department of State has told this Committee that "investigation and control of rebating and other malpractices on the part of shipping lines is an enforcement function statutorily assigned to the FMC, and the Department has no mandate in this area?"

Answer 9(a). We agree with the Department of State that they do not have a direct role in the investigation and control of rebating and other malpractices.

Question (*b*). Do you believe the Department of State can and should be supportive of the FMCs efforts to control rebating and other malpractices?

Answer 9(b). The Department of State can be of assistance to the FMC in its regulatory programs, specifically, the control of rebating and other malpractices, through their on-site abilities to provide information on economic conditions and foreign laws and practices and by persuading foreign countries to eliminate laws prohibiting disclosure of records and information to the United States.

Question 9(*c*). If so what could the Department do which would be helpful?

Answer 9(c). The State Department can continue to assist the FMC in its rebating and malpractice problems indirectly by continuing to provide us with insight into economic conditions and legislative situations prevailing in foreign countries, and can directly negotiate with foreign governments, at our request, to remove obstacles to our regulatory efforts.

Question 9(d). In your view, have any activities or inactivity of the Department hindered the achievement of the objectives of the Shipping Act, or our national shipping policy?

Answer 9(d). I think the Department of State has contributed to the achievement of the objectives of the Shipping Act, and national shipping policy, by providing the FMC with some information necessary to the development of policy and by providing foreign governments, on certain occasions, with the rationale and explanation of FMC rules and regulations which sometimes appear to be hostile to the shipping policies of other countries.

Question 10. Does the FMC support S. 2008, if amended along the lines suggested in your testimony?

Answer 10. Yes.

Question 11. In your statement (p. 2) you refer to the "agressive investigative program with respect to rebates and other malpractices" which the FMC is carrying on.

(*a*). Is this program "Investigation No. 9", whose purpose is to "delve continuously into rebating practices on a world wide basis (Bakke testimony, March 18)?"

Answer 11(a). Yes, Fact Finding No. 9 is presently part of this program. This Fact Finding Investigation is being conducted in tandem with the activities of the Bureau of Enforcement so as complete an investigation as possible will be accomplished. There is the possibility that this program will be refined as experience dictates and that Fact Finding No. 9 will evolve into a more comprehensive effort.

Question 11(b). Do you feel that "Investigation No. 9" is in and of itself adequate and sufficient to remedy the problem of rebating and other malpractices in our liner trades?

Question 11(b). No.

Question (c). Would enactment of S. 2008, with amendments as you suggest, be of substantial assistance to the FMC in achieving the objectives of "Investigation No. 9", and if so, why; and if not, why not?

Answer 11(c). Yes. S. 2008, with the amendments suggested in my testimony, would be of substantial assistance in combating rebating in our foreign trades, through both the stiffer penalties and the improved chances of access to documents located abroad. This would be so whether Fact Finding No. 9 remains in its present form or evolves into a different type of investigatory and enforcement program.

Question 12. In your statement (p. 3) you refer to the number of rebating and other malpractices investigations which the FMC has initiated since August, 1976. Of the 27 ocean carriers being investigated you state that 9 are American companies and 18 are foreign companies.

(*a*). With respect to your investigation of foreign carriers, has the FMC encountered any resistance or reluctance in any aspect of its investigations. By that I mean have:

Legal barriers been raised?

As a practical matter, has the FMC encountered reluctance or resistance from any of these carriers or their governments?

Has there been any "advice", "intervention", "recommendations", "persuasion", etc., from any other agency of government in any of these investigations?

I realize this is a comprehensive question, and the Committee would appreciate it if you would supply detailed information for the record.

If the question raises questions of confidentiality or foreign policy, the chair will, of course, discuss them with you "off-the-record", at your request.

Answer 12(a). To date, the Commission has received no indication from any foreign carrier we have contacted, that any of them will make disclosures of their rebating activities. Subpoenas which call for the production of documents have been issued to four foreign carriers viz., Zim Israel Navigation Co., Ltd. (Zim American Israeli Shipping Co., Inc.); Evergreen Marine Corporation; Orient Overseas Container Line (Orient Overseas Line); and Phoenix Container Liners.

Three of these carriers, Zim Israel Navigation Co., Ltd., Orient Overseas Container Line, and Phoenix Container Liners have, to date, filled motions to quash these subpoenas.

The legal grounds raised by these carriers in these motions to quash are generally that the Commission does not have the authority under a fact finding

investigation to issue such subpoenas; that the subpoenas are too broad and burdensome; that the subpoenas call for the production of documents which would compel the carriers to violate the laws of foreign countries such as Hong Kong and Israel; and that the subpoenas violate due process. In the case of Zim, an affidavit filed with the motion to quash states that the Minister of Transport of Israel has ordered Zim, its employees or persons acting on Zim's behalf, not to transmit to foreign governments any information relating to the carriage of cargoes, lists of customers, performance of carriage correspondence, contracts, movement of funds, shipping documents, etc., unless permission is obtained from the Minister of Transport. The affidavit states that the order of the Minister of Transport was issued on May 15, 1977, and issued pursuant to section 8 of the Commodities and Service (Control) Law and relates to Zim's activities as being essential to the security of the State of Israel.

Other than the discussions we have had with the State Department as described in answer to Question No. 31, I am not aware of any advice, intervention, recommendations, or persuasion from any other agency of government in any of the investigations presently being conducted by the Commission.

Question 13. Would the FMC please supply the Committee with a legal memorandum and conclusion on the question of: "Whether a common carrier by water may refuse to comply with a Federal Maritime Commission subpoena *duces tecum*, etc., requiring the production of documents in its possession on the ground that disclosure would contravene foreign statutes or foreign policy?"

Answer 13. Compliance with Commission subpoenas can be and has been circumvented by carriers raising a foreign law defense. This defense is not automatically successful, however, and must be judged on a case-by-case basis.

Restrictions imposed by foreign law, or, stated another way, by the national policy of another state as reflected by its legislation, may prevent either a court of law or an administrative agency of the United States from imposing sanctions against persons who do not produce documents pursuant to an otherwise proper production order. *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958).[1] The limits applicable in a given case are matters of fact; they depend upon the nature of the sanction, the purpose and scope of the U.S. law; the purpose and scope of the foreign law, the nature and extent of the penalties imposed by the foreign law, and the nature and extent of the carrier's efforts to procure a waiver of the foreign law or otherwise comply with the production order in question. The good faith of the person raising the foreign law defense is always relevant. Information cannot be deliberately secreted behind a cloak of foreign secrecy statutes.

The principle of international law which calls upon nations to minimize potential conflict between their laws and those of other states requires a careful balancing of interests before compliance with a U.S. production order will be ordered in contravention of a foreign statute.

United States v. *First National City Bank*, 396 F.2d 897, 901–904 (2d Cir. 1968);[2] Section 40, Restatement (Second) of Foreign Relations Law of the United States. Yet, it is also appropriate to consider whether a delinquent carrier seeks "privileges because of its foreign citizenship which are not accorded domestic litigants in United States Courts" in fashioning a remedy for noncompliance with a production order. That is, would a United States flag carrier participating in the same trade be restricted by the same foreign nondisclosure laws? *Society Internationale, supra*, at 210–211.

The Commission has sought enforcement of a judicially affirmed production order following Shipping Act section 27 proceedings on only one occasion. In *Federal Maritime Commission* v. *DeSmedt*,[3] the Second Circuit had confirmed the validity of FMC subpoenas entered against the officers and agents of seven U.S. and foreign flag carriers and had ordered compliance. The documents were not produced by three of the foreign flag carriers by the specified date, and a foreign law defense was raised. Despite the fact that the English and Indian laws in question were discretionary "directives" issued by government ministries and carried no criminal penalties, the District Court refused to hold the dilatory

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[1] In some instances, even the initial issuance of a production order may be improper, *Id.*, at 205–206.

[2] In *First National City Bank*, the court concluded that the competing interests were best resolved by the production of the foreign banking records being sought by a grand jury investigating Sherman Act violations.

[3] 366 F.2d 464 (2d Cir. 1966), *cert. denied*, 385 U.S. 974 (1967) affirming *Ludlow Corporation and FMC* v. *DeSmedt*, 249 F. Supp. 496 (S.D.N.Y. 1966).

respondents in contempt of court. *Federal Maritime Commission* v. *DeSmedt*, CA Nos. 30321 and 30322 (S.D.N.Y., unreported decision entered May 29, 1967).[4]

The District Court was hesitant in *DeSmedt* partly because it believed administrative sanctions to be more appropriate under the circumstances. The Commission does have a fairly flexible selection of sanctions available to enforce its production orders, especially in section 15 and 14b proceedings, but these administrative sanctions are more circumscribed than they might at first appear and have not proven especially effective deterrents to noncompliance. See *Calcutta, East Coast of India & Pakistan/U.S.A. Conference*, 11 F.M.C. 43 (1967), reversed 399 F.2d 994 (D.C. Cir. 1968).

Question 14. In your statement (p. 3) you state that current law is in need of amendment in view of "the persistence of rebating in our ocean borne foreign commerce and the scale of violations the FMC has recently uncovered."

(*a*). Does the FMC *now* have a definitive recommendation as to how current law should be amended?

Answer 14(a). The FMC is of the opinion that current law should be amended to strengthen the penalties for rebating and to facilitate access to documents and other evidence located abroad. In my testimony, I have suggested several amendments to the Shipping Act, 1916 to accomplish these purposes. While this Commission will continue to consider other, additional remedies to the problem of rebating, we believe that the suggested amendments should be incorporated into S. 2008 and should not await a three year period of study.

Question 14(b). Is it your view that the Shipping Act, 1916, is the body of law which must be amended, or should other federal laws be amended?

Answer 14(b). Yes, the Shipping Act, 1916 is the primary vehicle for controlling rebating and other malpractices and focus should be on amendments to that Act.

Question 14(c). Whatever amendments to the law may be necessary, is it your view that the amendments must be consistent with our present laws which mandate "open conferences", and prohibit "illegal rebating?"

Answer 14(c). Our view is that amendments to accomplish this purpose should be consistent with our present laws, as are the amendments that I have suggested in my testimony.

Question 14(d). In your view does our policy of "come one, come all" in our ocean trades lead to "overtonnage"?

Answer 14(d). The "Open Conference" as legislated under the Shipping Act has worked reasonably well. However, this policy when coupled with the volume, value and predictable availability of cargo to and from the United States has attracted many carriers who would normally be limiting their service to their own bilateral trades. This freedom of entry into one of the world's largest markets almost guarantees that one or more of our trade routes will be overtonnaged to some degree. Add to this the fact that many of our trading partners have some form of limited entry, capacity control, and/or national flag legislation, our open conference system does attract carriers having extra capacity.

Question 14(e). In your view is "overtonnage" in our liner trades one of the primary factors causing the widespread rebating which exists?

Answer 14(e). It is most unlikely that a carrier will engage in illegal rebating unless he feels it will enable him to maintain or increase his profit structure. When there are more ships than cargo, if a carrier is outside the conference he can lower his rates to increase his volume of cargo. If he does, he also advises his competition that he has lowered his rate. If, on the other hand, he offers a rebate from his published rate, he may be able to maintain his rate structure with other customers and rebate only where necessary to obtain enough cargo to fill his vessel.

If a carrier is a conference member and he is unable to obtain enough cargo to maintain his profit structure he must step up his sales efforts, improve his service to be more competitive, rebate, or drop out of the service. Overtonnage can and does cause rebating. On the other hand, a shortage of vessels tends to cause more frequent price increases.

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[4] A different reaction to such self-serving "directives" might occur today under the more realistic rationale recently expressed in *Civil Aeronautics Board* v. *British Airways Board*, 433 F. Supp. 1379, 1389–1390 (S.D.N.Y. 1977), a decision concerned with conflicting regulatory requirements imposed by United States and English government agencies rather than with the production of documents. The conflict was resolved in favor of the CAB after Judge Haight found the British agency to be acting primarily as an instrument of the state owned English airline affected by the U.S. regulation.

While overtonnage may be one of the primary factors which contribute to the competitive pressures that cause rebating, there are other factors which, in our opinion, must not be overlooked. Some of these are as follows:

A. Business practices and customs, particularly in the Far East and some European countries where it is common to pay rebates or offer some form of discount to attract cargo;

B. The economic power of certain shippers and forwarders whose business can make the difference between a profitable carrier and an unsuccessful one;

C. The mix of high and low rated cargo in virtually all trades which would create competition regardless of the cargo capacity of the vessels in the trade;

D. The general unwillingness on the part of most foreign nations to discourage rebating; and

E. The rigidity of the rates of some conferences which tends to retard or prevent timely legitimate response by member carriers to a shipper's rate requests.

Question 15. (*a*). Would enactment of S. 2008, and its requirement that the FMC make recommendations to the Congress, require any additional staff?

(*b*). If so, how many?

Question 15(*c*). Do you believe the objective of S. 2008, (i.e., to provide for a three-year period to reach a permanent solution of the rebating practices in the U.S. foreign trades) justifies the additional expense?

I realize my question does not allow for an immediate answer, but please supply it for the record. In doing so, please indicate whether your answer had to be cleared with OMB.

Answer 15(a), (b) and (c). The extent to which enactment of S. 2008 might require any additional staff depends upon the form of the bill as enacted and upon the reaction by the shipping community to its provisions. As the bill is now written, our best estimate is that we could administer its provisions without additional staff. This answer has not been cleared with OMB.

Question 16. In your statement (p. 5) you state that S. 2008 needs to be refined because, although the intent of the bill is directed at and limited to rebating, complaints filed under it cover many other subjects.

(*a*). Would you please consult with Committee staff, and submit the necessary "refinements" you believe are in order.

Answer 16(a). There are five places within the current text of S. 2008 that mention section 16 (other than paragraphs First and Third) in foreign commerce, and section 18(b). Language to refine these statutory references to apply only to rebating violations is attached hereto for the three instances in which section 32 of the Act would be amended by a new subsection (d). Language to correct the other two places in which this problem appears is contained in answer to question No. 18(b) herein.

"(d)(1) Subject to the provisions of paragraph (2), no penalty shall be imposed on any person under section 16 for any act in foreign commerce which constitutes a rebate or refund by any unjust or unfair device or means in violation of the initial paragraph or paragraph Second of section 16, or under section 18(b) for any act which constitutes a rebate or refund in violation of subsection 18(b)(3), if—

"(A) such act occurred before the date of enactment of this subsection; and

"(B) within one year after the date of enactment, the person who committed such act had made a good faith disclosure thereof to the Commission.

"(d)(2) . . . or any other acts in foreign commerce which would constitute a violation of section 16 (other than paragraphs First and Third) involving rebates or refunds by any unjust or unfair device or means or of section 18(b)(3) involving rebates or refunds; and (c) . . ."

"(d)(3) Any person who, after having made a good faith disclosure pursuant to paragraph (1)(B), violates any provision of section 16 (other than paragraphs First and Third) involving rebates or refunds in foreign commerce by any unjust or unfair device or means, or of section 18(b)(3) involving rebates or refunds, in lieu of the penalties otherwise provided for, . . ."

Question 17. Section 22 of the Shipping Act entitles any person who suffers injury by reason of a violation of the Act by any common carrier by water or other person subject to the Act, a "right" to seek reparation through the FMC from such common carrier or other person.

(*a*) Is it your view that this 'right of action' as it applies to rebating, i.e. through the FMC, is statutory? In other words, but for section 22, an aggrieved party could not seek redress through the FMC, nor would the FMC have any authority to entertain and grant a petition for redress.

(*b*) Assuming this "right" of action were not given under the Shipping Act, what private right of action would accrue to a person who suffers injury by rebating which is prohibited under the Shipping Act?

Answer 17(a). Yes. All FMC actions are exclusively statutory in nature. "An administrative agency can exercise only those powers conferred on it by Congress." *Trans-Pacific Freight Conference of Japan* v. *Federal Maritime Commission*, 302 F. 2d 875, 880 (D.C. Cir., 1962). Although other statutory provisions besides section 22 could provide a basis for a Commission order "redressing" unfavorable conditions caused by rebating in certain circumstances (e.g., Shipping Act section 15, Shipping Act section 14b, Shipping Act sections 14, 16, 17 and 18(b) in conjunction with the rulemaking power of section 43, and section 19(b) of the Merchant Marine Act of 1920), it is doubtful that any other section could support an order which directly prescribed compensation to an injured party by an award of money damages.

Answer 17(b). We know of no prohibition affecting the right of a person injured by a violation of the Shipping Act to seek redress in a federal district court for that injury. The Commission recently took this position before the U.S. District Court for the Eastern District of Louisiana whereupon the court found that

"There is no impediment to the recovery, in this Court, of ordinary damages. While 'reparation for the injury' caused by a violation of the Shipping Act may be sought before the Commission under 46 U.S.C. 821, its jurisdiction does not appear to be exclusive. The Commission has expressed its agreement with that view in a memorandum filed in this proceeding. The memorandum states in part:

> 'Barma, as noted at page 3 of its memorandum in opposition to Cargill's motion for summary judgment, filed April 14, 1976, has not sought reparation before the Commission. It has, however established a violation of Federal law for which recovery would appear authorized and has elected to seek recovery in the Federal Court. Cf. Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 224 (1966).'"[1]

Question 18. (*a*). Is it your view that S. 2008 as drafted necessarily would deny reparation to any person who has been injured by rebating? In other words, would the new section 22(c) necessarily preclude the right of a person to seek reparations under section 22, or is this a matter of how one construes the statute. as it would be amended by S. 2008?

Answer 18(a). The language of section 2(b) of S. 2008 would seem to remove from the existing first paragraph of section 22 any right of a complainant to file a complaint and seek reparation for the injury caused by a rebating violation. Any such complaint would be handled, instead, under the proposed new Shipping Act section 22(c) which contains no specific right to reparation. The Commission has only those powers granted to it by Congress and, in the absence of specific statutory authority, cannot award reparation.

Question 18(*b*). Would you please consult with the staff, and submit language to meet the reservation you raise?

Answer 18(b). The language we would suggest to meet this reservation, to limit the applicability of this section to rebating violations (See Question 16 herein), and to make certain other refinements suggested by our testimony and that presented by AIMS (See Question 33 herein) is as follows:

1. Delete section 2(b) of the bill and redesignate section 2(c) as section 2(b).
2. Amend section 2(b), as redesignated, to read as follows:

> (b) Immediately after subsection (b) as designated by this Act, insert the following:
>
> "(c)(1). In addition to the authority granted to the Commission by subsections (a) and (b) hereof, the Commission may, on its own motion, institute an investigation into possible violations of section 16 (other than paragraphs First and Third) involving rebates or refunds in foreign commerce by any unjust or unfair device or means or violations of section 18(b)(3) involving rebates or refunds, with the additional powers set forth in subsections (c)(2) hereof.

[1] *Baton Rouge Marine Contractors, Inc.* v. *Cargill Inc.* Civil Action No. 75-608, F. Supp. (E.D. La, Dec. 29, 1976).

"(2). Failure on the part of any person, respondent to a proceeding instituted pursuant to subsection (c)(1), or any other person directly or indirectly controlling, controlled by, or under common control with such respondent, to comply with any subpoena or any duly issued order compelling an answer to interrogatories or to designated questions propounded by deposition or compelling production of documents in relation to any investigation conducted under subsection (c)(1), shall:

"(A). Authorize the Commission to issue an Order to Show Cause why any or all tariffs filed pursuant to section 18(b) of this Act, by or on behalf of a respondent carrier, should not be suspended until that carrier or any person directly or indirectly controlling, controlled by, or under common control with such carrier, has fully responded to the pertinent deposition, interrogatory, production request or motion, or subpoena, and after such proceeding, to so suspend those tariffs. Any carrier whose tariff(s) have been suspended pursuant to this subparagraph and who accepts cargo for carriage during the suspension period which cargo would have otherwise been governed by the provisions of the suspended tariff(s) shall be subject to a civil penalty of not more than $50,000 for each shipment so accepted. If it appears to the Commission that a carrier is continuing to operate in any affected trade during any such suspension period regardless of the monetary penalties to which it may be subjected, the Commission may refer the matter to the Secretary of the Treasury who shall deny to that carrier's vessels the clearance required by section 4197 of the Revised Statutes of the United States, as amended (46 U.S.C. 91); and

"(B). Create a rebuttable presumption that the matters of fact placed in issue by the complaint or by the Commission's order of investigation are resolved against the respondent for the purpose of the proceeding."

Question 19. In your statement (p. 6) you state that the "right of a complainant to seek reparation for rebating violations is one more deterrent to such insidious activity."

(*a*). In the past five years, how many persons have availed themselves of this right?

(*b*). In each instance, what has been the disposition of the matter?

Answer 19 (a) and (b). While neither the Commission's records nor the available digests are constructed in such a way as to provide a ready answer to this question, we have been able to locate only one instance during the past five years in which a complainant sought reparation for injuries caused by alleged rebating. This case was entitled Docket No. 76–50, *American Export Lines, Inc.* v. *Dart Container Line*, and the complaint was withdrawn after discussions between the parties. We anticipate that further actions will be instituted, however, as a result of the disclosure now being made involving rebating activity.

Question 20. In your statement you say that the 30 days after receiving a complaint as provided in S. 2008, for the Commission to issue an order of hearing and investigation or to dismiss the complaints as insubstantial, is an "insufficient amount of time to render an informed decision."

(*a*). Why is this an insufficient amount of time?

(*b*). If it is an "insufficient amount of time", how much time should be provided commensurate with the interests of the individuals involved, and the interest of sound administrative practice?

Answer 20 (a) and (b). The Commission is of the opinion that dismissal of a complaint without hearing could vitiate the right of a complainant to due process of law. Clearly, 30 days is not sufficient time in which to conduct any form of hearing and render an informed decision. The Commission's suggestion here is not that the period of 30 days be extended, but rather, that S. 2008 be amended to retain the *status quo*, i.e. that any complaint be docketed and heard pursuant to the Commission's Rules of Practice and Procedure and the Administrative Procedure Act.

Question 21. In your statement (p. 6) you state that the requirement in S. 2008 that in proceedings involving an issue of rebating a decision must be rendered by the FMC within 6 months is unnecessary and too restrictive because by far most rebating violations are handled informally.

(*a*) In the past ten years how many rebating violations has the FMC pursued through the informal procedures you refer to?

(*b*) In how many of these cases was the FMC successful in securing an assessment of a civil penalty, or enforcement claim in the Federal District Court?

(*c*) In how many of these cases was the FMC unsuccessful?

Answer 21 (a), (b) and (c). Informal Procedures have only been utilized since September 1970 under the Federal Claims Collection Act of 1966 (31 U.S.C. 951 *et seq.*) and since August 1972 under the compromise authority given to the Commission by P.L. 92–416. Prior to August, 1972, rebating violations by carriers and shippers were misdemeanors, and such criminal offenses could not be settled by the Commission.

In the past 5 years, FMC has pursued, through informal procedures, seven rebate cases[1] and has successfully recovered penalties in four and has three settlements still pending. As the result of the voluntary rebate disclosures in late 1976 and during 1977, the Commission has developed or is currently developing at least another 75 rebate cases involving both carriers and shippers that are scheduled to be processed under the Commission's informal settlement procedures. During the past five year period the Commission has also certified another seven cases to the Department of Justice for either criminal (pre-August, 1972) or civil prosecution for illegal rebating activities[2] and has recovered penalties in four cases, has had one dismissed and two are still pending.

Question 22. If the new section 22(c) in S. 2008 prescribing what the FMC *must* do when it receives a complaint alleging rebates were amended to provide what the FMC may, in its discretion, do, would the objections you raise with respect to that section (pp. 4–7) be met?

Answer 22. Without more, a change in the language of section 2(c) of the bill from "shall" to "may" would do little to meet our objections to that section. A complaint directed at rebating would still be governed by the terms of the new section 22(c) by virtue of the proposed language in section 2(b) of the bill which would amend the first sentence of section 22 to read "Except as provided in subsection (c), that". The Commission could still dismiss a complaint without hearing if it found the complaint to be insubstantial. And the ultimate result of any proceeding conducted under the provisions of that section could, at best, be a finding which would then have to be enforced through a Federal District Court in order for penalties to be imposed. However, such a change in the language of the bill would permit the Commission to use the information furnished by complaint, or otherwise, to pursue its own informal investigation if it deemed such an approach more efficient than the institution of a formal proceeding.

Question 24. In your statement (p. 9) you state that "the penalties prescribed in S. 2008 are applicable only for failure to comply with discovery or subpoenas. We would suggest that similar, severe penalties should be inserted into applicable sections of the Shipping Act for any person who is found to have given or received a rebate or aided in its accomplishment."

(*a*) Inasmuch as the penalties in S. 2008 are primarily intended to aid the FMC in gathering information as to rebating, and other provisions of the Shipping Act provide penalties for rebating, why should S. 2008 provide additional penalties for rebating? Especially since it only has a 3 year life?

Answer 24. While the Shipping Act, 1916, may now provide for penalties for rebating, it is our view that those penalties are insufficient to meet the problem. Thus, we recommend that the penalties suggested in S. 2008 be modified and made applicable to a finding of a rebating violation. We believe this approach is worth pursuing on an interim, three year basis, with a view toward permanent amendment to the rebating penalties under the Shipping Act should they prove effective.

Question 25. In your statement (p. 10) you say there is no mechanism prescribed in S. 2008 for imposing "port closing" sanctions. Are you familiar with section 10 of S. 2083, and section 105 of H.R. 6803? (Those sections empower the Secretary of Commerce to deny entry to U.S. ports of any vessel not insured, bonded or otherwise certificated to financial responsibility for possible pollution damages).

(*a*) Is there any reason why the same procedure or mechanism could not be followed under S. 2008?

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[1] Berg Mills, "K. Line," Sony, Pat Fashions, Superscope, Stanley and Sea-Land.

[2] Sea-Train (plead guilty and fined $57,000); Blue Sea (dismissed on jurisdictional grounds); Topp Electronics (plead guilty and fined $75,000); Elie Bensimon (plead guilty and fined $500); E. B. Walker (plead guilty and fined $1,000); Trax-Mex and Atlantica, both pending.

Answer 25. Should Congress decide to adopt the suggested "port closing" sanction set forth in S. 2008, we would recommend that such a sanction be implemented through the Secretary of the Treasury who may withhold clearance to vessels pursuant to section 4197 of the Revised Statutes of the United States, as amended (46 U.S.C. 91). Such implementation mechanism should be clearly set forth in the bill.

Question 26. In your statement (p. 9) you suggest a "tariff suspension" as a sanction for failure to comply with an FMC order of investigation as opposed to a "port closing" sanction.

(*a*). What would be the effect of a tariff suspension?

Answer 26. Without an effective tariff on file with the Commission, a common carrier cannot lawfully operate in our foreign or domestic offshore trades. While the existing monetary penalties for operating without a tariff are grossly inadequate ($1000 per day), any such violation is highly visible and subject to a court injunction. As I have suggested in my testimony, an increase in the civil penalty from $1000 per day to $50,000 per day would also help to prevent flagrant abuses of section 18(b)(1) of the Shipping Act, 1916 which prohibits such untariffed operations.

Question 27. During the March hearings on rebating one witness testified as follows:

"A much more sophisticated approach is possible and, I submit, virtually undetectible. I have heard of one foreign flag shipping line which had vessels operating both in the U.S.-foreign and the foreign-to-foreign commerce. This company had a customer who was demanding a rebate on goods being imported into the United States on its vessels. The customer owned a petroleum distribution outlet in another country, through another subsidiary, from which the carrier's vessels purchased bunker fuel. The carrier would give the rebate by paying a higher price for the bunker fuel on its foreign to foreign operations to an entirely different subsidiary of the same parent corporation. I defy any of the big eight auditing firms to find that one, even given full access to a foreign flag carrier's books, which they would never get."

(*a*) Is it likely that the Commission would discover such practices in its current general investigation?

(*b*) If it did, is it likely under existing law that the Commission would be able to obtain all necessary documents, etc.?

Answer 27 (a) and (b). First of all, if any of the major auditing firms had "full access" to the foreign carrier's books, they should be able to discover that the foreign carrier was paying inflated bunker prices for a particular port or area. Finding this situation, it may be possible to trace it back to the parent and to the parties involved. This is a very difficult situation, and it is not likely that the current general investigation would be able to document this type of activity. Because of the difficulty of obtaining documents from foreign companies, the situation of foreign companies, which are not in a primary U.S. foreign commerce transportation relationship viz., shipper and carrier, will always present an extremely difficult situation with regard to proof. However, to date, we have ample evidence that the methods utilized by most carriers to pay rebates have not been as sophisticated as the witness stated.

Question 27(c). What obstacles would there be to investigating this type of situation and enforcing our anti-rebating laws?

Answer 27(c). The obstacles to any investigation of this type of situation would be that all the necessary documentary evidence to prove such a practice existed would be located abroad and difficult to obtain. In addition, there may also exist the situation where foreign governments have passed laws which prohibit their carriers and other firms from turning over such documentation to agencies of the United States.

Question 28. Has the Commission ever requested assistance from the Department of State in its rebating investigation, or other rebating matters?

Answer 28. On October 3, 1960, the predecessor to this Commission instituted an investigation into the activities of Mitsui Steamship Co. Ltd. (Mitsui) to determine whether that carrier had paid rebates to a German consignee. In connection with that investigation, the Commission, on March 1, 1962. issued an order pursuant to section 21 of the Shipping Act, 1916, directing Mitsui to furnish the Commission certain information, wherever located. Upon the ultimate failure of Mitsui to comply with that order and after several extensions of time, the Commission on October 2, 1962, formally requested the Department of Justice

to enforce the Commission's order. Over a period of the ensuing three years, various discussions concerning this matter were held between officials of the FMC, the Department of Justice and the Department of State. In a letter dated October 29, 1965, the Department of Justice concluded,

> "Since it appears that in the final analysis any action to enforce the section 21 order against Mitsui would most likely prove unavailable and since the Department of State believes that such litigation would disturb this Government's relations with Japan, we have concluded that enforcement proceedings should not be commenced. Accordingly we are closing our files on this matter.

Thereafter, the Commission referred the matter of collection of penalties for noncompliance with the section 21 order to the Civil Division of the Department of Justice. No action was ever taken on that referral and, on March 4, 1966, the Commission was forced to discontinue its investigation on the basis that any action to collect penalties for violations that may have occurred would be barred by the applicable statute of limitations.

Since the Sea-Land disclosure stimulated the recent investigatory efforts into rebating in our foreign commerce, the Commission has been concerning its efforts in developing sources of evidence in the United States. Until recently, we had not, since the Mitsui case, requested specific assistance from the Department of State. We have, within the past several weeks, requested their assistance to solve several problems in the area of foreign document production. The Commission would welcome any assistance from the State Department or any other agency, and is encouraged by the cooperative attitude of officials of the State Department in recent weeks.

Question 29. It has been suggested that the ultimate solution to the rebating problem may be a series of separate agreements or treaties between the U.S. and each of its trading partners. Would you comment on this approach.

Answer 29. The Commission enthusiastically supports any international agreements which would assist in resolving the rebating problems in our foreign trades. This may very well be the ultimate solution. We are ready and willing to cooperate with the Department of State and any other agency in formulating such agreements and in providing any information to assist in that effort.

Questio 30. (*a*). Is Fact Finding Investigation No. 9 being challenged in any way, administratively or judicially?

(*b*) If so, by whom and what are the circumstances of each challenge?

Answer 30 (a) and (b). The initiation of Fact Finding Investigation No. 9 has led to several challenges of the Commission's authority to issue subpoenas in fact findings investigations. Because fact finding investigations have not been used in recent years and, when used in the past, frequently did not employ subpoenas, these challenges have raised new issues concerning the validity of the Commission's subpoena authority.

The argument being advanced by those resisting compliance can be summariezed as follows:

> The Commission's subpoena authority is found in section 27 of the Act. The language of section 27 limits the use of subpoenas to proceedings convened under section 22. Proceedings contemplated by section 22 are formal adjudicatory proceedings. An investigatory proceeding such as Fact Finding No. 9 is not within the category of proceedings for which Congress granted the Commission the right to employ compulsory process.

This argument was first raised by Zadocorp, a San Francisco firm which received a Commission subpoena. The Commission denied Zadocorp's motion to quash and the dispute was settled prior to any further litigation. At the time of the denial of the Zadocorp motion, the Commission amended its order to invoke section 214(a) of the Merchant Marine Act, 1936, as an additional source of Commission authority.

Shortly after the Commission denial of Zadocorp's motion to quash, a similar motion was filed by Kanematsu-Gosho (U.S.A., Inc.). Following the Commission denial of Kanematsu-Gosho's motion, Kanematsu filed suit in a U.S. District Court seeking declaratory relief for what it alleged was action taken outside the Commission's statutory authority. The Commission has answered this complaint and has counterclaimed for enforcement of the subpoena. This litigation will no doubt provide the first judical determination of whether the Commission's investigatory subpoena power is valid.

Pending before the Commission is a lengthy motion to quash filed by Zim Israel Navigation Co. This motion has refined the authority argument to a considerable degree and has raised several additional grounds upon which it urges the Commission to withdraw its subpoena. Zim avers that many of the documents called for by the subpoenas are located at Zim's home office in Israel or in branch offices located in various foreign countries. Zim contends that the Commission rules require that subpoenas for evidence located overseas be issued pursuant to procedures not adhered to in Fact Finding No. 9. The motion also challenges the propriety of delegating the subpoena power to the Commission's Investigative Officer.

The Commission's position has been that the investigatory power found in section 22 of the Shipping Act, 1916 is broad enough to encompass fact finding and, thus, the subpoena power is appropriate in such investigations. Our rules dealing with Fact Finding Investigations (46 C.F.R. 502.281) were published pursuant to section 22 of the Act.

Question 31. The Department of State has said that representatives of foreign governments have informed the Department that their governments are willing to enter into discussions with the FMC and the Department of State with the aim of finding a satisfactory solution to the rebating problem.

(*a*). Has this information been transmitted to the FMC?

Answer 31(a). Yes.

Question 31(*b*). If so, what foreign governments are involved?

Answer 31(b). The information furnished by the Department of State thus far has been general in nature. Only Japan has been specifically mentioned in our discussions to date.

Question 31(*c*). Are the FMC and the Department pursuing the matter? If so, please explain.

Answer 31(c). Yes, officials of the Department of State and the FMC have met on two occasions over the past several weeks on this problem. Moreover, the Department of State has furnished the FMC with a current list of those countries which have laws that may be used to prevent an agency of another government from obtaining business records from their citizens.

Question 32(*a*). Would the Administrative Procedure Act or due process require judical review in the case of a tariff suspension or port closing provided for in S. 2008?

(*b*). If not, would there be such a provision?

Answer 32(a) and (b). Tariff suspension or denial of entry at U.S. ports would take the form of a final agency order under S. 2008 and, as such would be reviewable in an appropriate U.S. Court of Appeals under the provisions of the Hobbs Act (28 U.S.C. 2342).

Question 32(*c*). If such sanctions are appealable, would appeals be so time consuming the sanctions would be ineffective?

Answer 32(c). While an appeal from such an agency decision may be time consuming, the sanctions would only be rendered ineffective if the reviewing Court decided to stay the Commission's order pending the appeal. If such a stay were granted, the sanctions would probably be ineffective at the conclusion of any appeal.

Question 33. The American Institute of Merchant Shipping's (AIMS) testimony recommends three amendments to S. 2008. Would you please submit your analysis and comments on each?

Answer 33. The first amendment proposed by AIMS would broaden the language of section 18(b)(3) of the Shipping Act to specifically encompass contractors, affiliates, officers, agents and employees of carriers and to impose upon shippers the same standards of compliance with tariffs that now exist for carriers. While the Commission would support this amendment as it applies to shippers, and would suggest a further amendment to the Act, as set forth below, to accomplish this purpose, the extension of the language of section 18(b)(3) to various types of carrier agents would seem to be counterproductive. The entitled currently regulated by the Shipping Act, 1916 is the common carrier, and not any particular person within the carrier organization. Under all of the applicable law on the subject, the principal, the carrier, is liable for the actions of its agents and it is the carrier who must answer to the Commission and to the Courts for violations of the Shipping Act by any of its officers, employees or agents. Nothing, therefore, is gained by amending section 18(b)(3) to specify officers, employees, agents, contractors or affiliates acting on behalf of common carriers.

On the other hand, such specific language in section 18(b)(c) could be the basis for an argument as to whether the carrier or the responsible agent should be liable for any violation of that section. Moreover, such language could be interpreted as an indication that other sections of the Act, where such specific language does not appear, are not intended to apply to actions by various types of agents.

The second amendment suggested by AIMS would broaden the scope of the discovery and penalty provision of section (c)(2) of the bill to include other persons directly or indirectly controlling, controlled by, or under common control with the respondent and would inject certain due process safeguards into the suspension and port denial provisions thereof. While the Commission concurs in the concept and obvious purpose of this amendment, we have some reservations as to the particular language used by AIMS. We would prefer the language that we have set forth in answer to Question 18(b) above.

The third amendment set forth in AIM's testimony would add a new section to S. 2008 to require a certification by the chief executive of each common carrier and by a responsible officer of each shipper that reasonable diligence is being exercised to insure that no rebates are being paid or received and that the carrier or shipper will fully cooperate with the FMC in its investigation of illegal rebating. The Commission fully supports the concept of such a certification requirement but believes that improvements can be made in the form suggested by AIMS. For example, AIMS proposes no sanction for failure to comply with the certification requirement. We believe that the following language would better accomplish the purpose.

> SEC. 5 The chief executive officer of each common carrier by water in the foreign commerce of the United States shall certify under oath, to the Federal Maritime Commission, within 60 days after enactment of this section, that (1) it is the policy of that carrier that no owner, officer, employee or agent will pay or knowingly permit the payment of any rebate which is unlawful under the Shipping Act, 1916, and that engaging in such unlawful activity shall result in permanent loss of employment with that company, or termination of agency relationship; (2) such policy has been promulgated, in writing to each owner, officer, employee and agent within the immediately preceding twelve month period, and (3) the carrier will fully cooperate until the Federal Maritime Commission in any invetigation of illegal rebating in the United States foreign trades. Such certification shall thereafter be filed annually, on or before September 30 of each year, by the chief executive officer of each common carrier by water in foreign commerce. Failure to file any such certification shall result in a civil penalty of not more than $5,000 for each day such violation continues.

In order to implement the extension of section 18 of the Act to shippers as suggested by AIMS, the Commission recommends that the definition of "other person subject to this Act" found in section 1 of the Act be modified as follows:

> "The term 'other person subject to this Act' means any person not included in the term 'common carrier by water' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water, and, for purposes of section 22, includes a shipper, consignor, consignee, forwarder, broker, or other person, and any officer, agency or employee thereof.

This amendment would make it clear that the Commission could investigate violations of the Act by shippers.

Question 34. The procedures in S. 2008 require that in any proceeding involving an issue of rebating the FMC mut render a decision within 180 days.

On pages 6–7 of your statement you state that the requirement may be unnecessary and potentially too restrictive because most rebating violations are best handled informally by the FMC staff.

You point out that in the past ten years there has been only one adjudicative proceeding involving rebates before the FMC and that the informal way of proceeding has been utilized over 100 times for all types of Shipping Act violations, since 1971, which has resulted in the collection of approximately $5,000,000, in penalties.

(*a*) Inasmuch as the Sea-Land settlement was $4 million, and the recent Sony settlement was $340,000, how many other settlement have there been since 1971? What was the $ value of each?

Answer 34(a). See Attached Sheet.

Enforcement claims settled by the commission [a]

Case name and section violated	*Sum settled*
Agropecuaria Y Maritima Santa Rosa, 18(b)	$4,000
Alaska Aggregate, 2, Int'l. Coastal	5, 500
Allied Van Lines Int'l. Corp., 18(b)	3, 500
Aloha Consol, Int'l., 16	3, 500
American Export Lines, Inc., 21	600
Argimbau, D. V. & Co., 32	3, 500
Aspen Steamship Corp., 18(b)	2, 000
Atlantic Shipping Co., 18(b)	2, 500
Baltic Shipping Co., 18(b)	4, 500
Belfranline, Ltd., 18(b)	2, 000
Bemo Shipping Co., Inc., 44	1, 000
Booth S. S. Co., Ltd., 18(b)	3, 000
Bottacchi, A., 18(b)	5, 000
Busques Mercantes Del Caribe, 18(b)	1, 000
Canada Express Line, 18(b)	2, 300
Caparra Stevedoring & Maritime Agencies, Inc., 18(b)	6, 000
Cartwright Int'l. Van Lines, 18(b)	2, 000
Cast Lines	
Certified Corp., 16	9, 000
Chilean Line, 18(b)	2, 000
China Merchants Steam Navigation, 18(b)	10, 000
City of Port Huron & Port Huron Terminal Co., 15	1, 000
Coastal Barge, 16	1, 500
Compania Nacional De Navigacion, 18(b)	3, 500
Compaigne Generale Transport, 18(b)	4, 000
Coordinated Carib. Transport, 15	30, 000
Crest Mayflower Int'l., Inc., 18(a)	3, 600
Dependable Trucking Co., Inc., 16	5, 000
Econocaribe Consolidators, et al, 16 and 18(b)	4, 500
El Seis De Mayo Express, 18(a)	4, 000
Farrell Lines, Inc., 2	2,000
Far Eastern Steamship Co., 18(b)	15, 000
Fastmar Service, Inc., 18(a)	4, 400
Federal Commerce & Navigation Noroship Agencies, Inc., (CHIC), 18(b)	5, 000
Flota Mercante Gran Central, 15	30, 000
Frota Amazonica, S. A., 18(b)	10, 000
Guam, 16	4, 000
Hanseatic Vaasa Line, 18(b)	8, 000
Harms, E. H. U.S.A., Inc., 510.23(d)	2, 000
Harper, Robinson & Co., 18(b)	20, 000
Hawaiian Export Service, 16	5, 250
Hoegh Ugland, 18(b)	10, 000
Home Pack Transport, Inc., 18(b)	1, 000
Honolulu, 16	5, 250
Hyman Michaels Co., 18(a)	4, 000
Intl. Warehouse Industries, Inc., 18(b)	1, 000
Interconex, Inc., 18(b)	3, 000
Ivaran Lines, 18(b)	4, 000
Japan Lines, Ltd., et al, 15	3, 000
Jugolinija Line, 18(b)	5, 000
Kambara Kisen Co., 18(b)	1, 500
Kingpak, Inc., 18(a)	1, 500
King Import Ltd., 16	6, 500
Lasco Container Services, Inc., 44(a)	1, 250
Lavino Shipping Co., 15	3, 000
Leeward Islands Shipping Corp., 18(b)	2, 000
Linea Amazonica, S. A., 18(b)	3, 000
Merchants International, 18(b)	1, 500

See footnotes at end of table.

Enforcement claims settled by the commission [a]—Continued

Case name and section violated	*Sum settled*
Mid Pacific Forwarding Co., 16	$4,000
Mini Carriers Systems, Inc., 18(b)	2,500
Muhammadi Steamship Co. Ltd., 18(b)	4,500
National Shipping Corp. of Pakistan, 18(b)	5,000
Naviera Lagos, S. A., 18(b)	2,500
Naviera Orinoco, C. A., 18(b)	5,000
Nippon Int'l. Container SVC, 18(b)	12,000
Norton Line (Compania Denavegaoao, Loide Bras: et al 18(b)	10,250
Northern Pan American Lines, 18(b)	9,000
Peninsula & Oriental Steam Nav. Co., 18(b)	3,000
Port of Palm Beach District and West India Shipping Co., 15	1,500
Puerto Rico Maritime Shipping Authority, 16	5,000
Roc International, Inc., 18(b)	4,500
Roland Thompson, 44(a)	1,500
Sandpiper Int'l. Inc., 18(b)	1,500
Sanko Steamship Co., Ltd., 18(b)	16,000
Sanko Steamship Co., Ltd., 18(b)	1,500
Schick Moving & Storage Co., 18(a)	600
Sea Land Service, Inc., 18(b)	10,000
Sea Land Service, Inc., (K-Line, Japan Line and Y–S Line), 15 and 18	7,000
Sea Land, 16	[b] [c] 1,500,000
Sea Land (Portugal to U.S.), 18(b)	5,000
Seariders, Inc., 18(b)	800
Seatrain Int'l., S.A., 18(b)	7,000
Seatrain Lines, Inc., 18(b)	1,000
Shipping Corporation of India, 18(b)	1,500
Shipping Corp. of India, 18(b)	3,500
Sovereign Marine Lines Inc., 18(b)	4,000
Sony and Affiliate Sonam, 16	[c] 340,000
States Steamship Co., 15	12,000
Stauffer Chemical Co., 18(b)	35,000
Sterling Navigation Co., Ltd., 18(b)	8,000
Sterling Navigation Co., Ltd., 18(b)	1,600
Starlight Trading, Inc., 16	[c] 20,000
States S. S. Co., 15	12,000
Superscope, Inc., 16	[c] 27,000
Takasuke Okada, 44(a)	1,200
Tokai Line, 18(b)	1,200
Toko Line, 18(b)	16,000
Tokai Line, 18(b)	9,500
Toko Line, 18(b)	15,000
Transatlantic Container Transport, 18(b)	13,500
Transway Corp., 16	9,000
Tras-Mex Line, 18(b)	7,000
Tropical Shipping & Construction Co., 18(b)	8,000
TTT, 18(a)	1,000
Union Steamship of New England, Inc., 18(b)	5,000
United Enterprises & Shipping, 18(b)	999
United Foreign Shipping, 18(b)	1,000
U.S. Lines, 18(b)	7,000
West Coast International, 18(b)	2,500
West Coast Moving & Storage, 18(b)	2,500
West India Shipping Co., 15	1,500
WTC International Inc., 32(c)	750
Zim Container Service, 18(b)	2,000

Total claims: 113.

Total recovery to date: $2,482,517.

[a] The Commission's Enforcement Claim program was begun in October, 1970. Some of the listed claims may include more than one respondent.

[b] Although the Sea-Land Settlement was for $4,000,000, only the first installment of $1,500,000 that has thus far been paid is included in the above total collections. Sea-Land's second installment of $1,000,000 is due January 15, 1978.

[c] Section 16 rebate violations.

Question 34(b). S. 2008 is intended to make it easier for the FMC to gather the information necessary to recommend a permanent solution to rebating; and its provisions expire 3 years after enactment. Therefore, if the sanctions in S. 2008 are to be effective, isn't it necessary to prescribe a finite period (180 days) within which the FMC must resolve a rebate issue? Otherwise, negotiations could be prolonged throughout a good part of the life of S. 2008.

Answer 34(b). The Commission believes that any formal adjudicatory investigation of rebating matters will necessarily consume more than 180 days and that it would be a better utilization of time and manpower to attack rebating matters with our investigative staff until there is sufficient evidence to bring an enforcement claim. Once such evidence has been developed, both the process of compromising the claim and/or any subsequent litigation are much simplified.

Question 34(c). Is it your view that the provision in S. 2008 which requires the FMC to issue an order of hearing and investigation within 30 days after receiving a complaint, precludes the FMC from using the informal procedures it now uses? In addition to the formal proceeding, couldn't you still proceed informally as long as you resolved the matter in 180 days?

I mean aren't adjudicatory matters now settled through informal negotiations while they are also *sub judice?*

Answer 34(c). Experience has shown that a party will usually cooperate with an investigator on an informal basis, probably to avoid litigation. Once a matter has been placed in litigation, however, respondents' attorneys generally insist upon their right under the Administrative Procedure Act, that any further investigation take place formally, within the framework of the Commission's Rules of Practice and Procedure. While the parties to a Commission proceeding often resolve their differences informally and settle the matter prior to any decision, thereon, it is unlikely that any respondent in a formal rebate investigation is going to enter into discussions with the Commission's General Counsel on the subject of compromising a penalty for the violations sought to be established by the Commission in the proceeding as long as there is the least chance that the respondent will be successful in the litigation.

Question 35. As part of your criticism of the provision in S. 2008 regarding an adjudicatory proceeding in rebate cases, you state a p. 8, that "there is little likelihood that any adjudicatory proceeding could be completed within 180 days, as provided in the bill."

(*a*). Doesn't the bill in effect provide for a longer period than 180 days? All the FMC would have to do is issue an interim order stating in full why it could not issue a final order and establish a period within which it would issue a final order.

Answer 35(a). While S. 2008 does provide that the Commission could issue an interim order and establish a period within which it would issue a final order, the mere statement of the 180 days deadline in the statute raises a presumption that Congress has decided 180 days is a reasonable time for rendering a final decision and the Commission would have failed to do so.

Question 36. S. 2008 provides that the FMC may, without a hearing, deny a complaint in writing stating the reasons for its denial.

(*a*). In your view would such a denial by the FMC be appealable to the Courts under the Administrative Procedure Act, or any other provision of law?

Answer 36(a). The Commission is of the opinion that denial of a complaint in writing under the provisions of S. 2008 would constitute a final order of the agency, reviewable by an appropriate U.S. Court of Appeals under the provisions of the Administrative Orders Review Act (28 U.S.C. 2342).

Question 36(b). Presently, under section 22 any person may file a complaint with the FMC regarding rebating.

(i) May the FMC dismiss such a complaint without hearing?
(ii) Is such a dismissal appealable, and if so, where?

Answer 36(b) (i). The Commission's Rules (46 C.F.R. 502.61 and 502.62) provide that the filing of a complaint automatically institutes a proceeding. The Commission may require that the complaint be amended if it fails to indicate the sections of the acts alleged to have been violated or clearly to state facts which support the allegations. Presumably, failure to so amend a complaint could result in dismissal of the complaint. Otherwise, however, section 22 of the Shipping Act, 1916, and the aforementioned Commission Rules require that the

complaint be served upon the respondent and that some form of hearing be conducted.

Answer 36(b)(ii). Dismissal of any complaint would be reviewable by an appropriate U.S. Court of Appeals under the provisions of the Administrative Orders Review Act (28 U.S.C. 2342).

Question 37. On p.7 of your statement you refer to "assessments of a civil penalty for rebating by the FMC, or enforcement of the claim in a Federal District Court."

On p.8 you state that the FMC "cannot assess penalties on its own at present."

Would you please explain these statements? Are they inconsistent?

Answer 37. The statements appearing on pages 7 and 8 of the testimony are inconsistent because of an editing change to page 7 which was not corrected prior to presentation of the testimony. The word "assessment" on page 7 should read "compromise". A clear explanation of the authority sought by the Commission in this area appears at pages 16 and 17 of the testimony.

Question 38. At pages 6–7 you say that the adjudicatory procedures in S. 2008 are unnecessary because violations of the Shipping Act such as rebates are best handled informally.

Under S. 2008, however, the FMC can order a rebate investigation on its own motion.

Wouldn't this provision and the possible consequence that could follow serve as a spur for parties to settle informally with the FMC?

Answer 38. The Commission has always had the authority to order a rebate investigation on its own motion. In this respect, S. 2008 would offer no further incentive for settlements. However. the stringent penalties set forth in S. 2008 for failure to produce documents and otherwise comply with discovery or subpoenas may very well serve as a spur to produce such information as may lead to a settlement of the matters. Thus, the Commission is of the opinion that the penalties, and not the procedures set forth in S. 2008 would be the most helpful additions to the Commission's enforcement powers.

Question 39. (*a*). Would FMC determinations under the new section 22(c) of the Shipping Act be governed by the requirements of administrative procedure and judicial review (Public Laws 89–554 and 90–23)?

(*b*) Would you support your answer with a legal memorandum?

Answer 39(a) and (b). The procedure described in the proposed new section 22(c) would be an adjudicatory procedure governed by sections 554, 556 and 557 of Title 5 of the U.S. Code. As such, any order, resulting from such a proceeding would have to be made on the record, after opportunity for hearing. Hearings compelled by reason of the due process requirement of the U.S. Constitution are covered by such section under the general phrase "required by statute". *Clardy* v. *Levi* 545 F.2d 1241 (9th Cir. 1976). Due process in an administrative hearing includes a fair trial, conducted in accordance with fundamental principles of fair play and applicable procedural standards established by law. *Swift & Co.* v. *U.S.* 308 F.2d. 849 (7th Cir. 1962).

Any order issued by the Commission pursuant to the terms of the proposed new section 22(c) would be a final order of the Commission within the meaning of 28 U.S.C. 2342 and, as such, would be reviewable in an appropriate U.S. Court of Appeals.

Question 40. At yesterday's hearing it was suggested that the sanctions in S. 2008 i.e. port closings and tariff suspensions, be made discretionary with the FMC rather than mandatory as the bill provides.

I feel this recommendation has considerable merit.

If S. 2008 were amended to make those sanctions discretionary with the FMC, what assurance would there be that in the exercise of that discretion the FMC would be guided by the purpose of S. 2008. rather than other, foreign policy considerations which the Department of State might urge in a particular case?

Answer 40. If such discretion were vested in the Commission, the only assurance that we can offer Congress is that such discretion would be exercised in the public interest. Should Congress wish to exclude foreign policy considerations from the realm of the public interest for this purpose, such intent could easily be expressed in the legislative history of S. 2008.

Question 41. It has been recommended that S. 2008, also amend section 27 of the Shipping Act so that discovery procedures and subpoena power apply to documents abroad in the case of a proceeding instituted pursuant to section 2 of the bill.

(*a*) Do you agree such an amendment is necessary? If so, please supply the necessary language.

Answer 41. No. Amendment of section 27 is unnecessary because the courts have already interpreted section 27 to apply to documents and witnesses located abroad to the extent that the sovereign power of the United States will permit jurisdiction over such persons and documents. *Federal Martime Commission* v. *DeSmedt*, 366 F.2d 464, 468–474 (2d Cir. 1966), *cert. denied*, 385 U.S. 944 (1966). Althought the *DeSmedt* decision dealt only with the Commission's *subpoena* powers, nothing in the history of the amendment which subsequently added an express grant of *discovery* authority in adjudicatory proceedings to section 27 (P.L. 90–177, enacting S. 706) indicates a Congressional intention to restrict the geographical scope of discovery. *E.g.*, Testimony of FMC Chairman Harlee, Subcommittee on the Merchant Marine and Fisheries, Senate Committe on Commerce, *Hearings on S. 706*, 90th Cong., 1st Sess., at 6–7 (May 8, 1967) ; Testimony of Leonard G. James, Esq., Subcommittee on the Merchant Marine, House Committee on the Merchant Marine and Fisheries. *Hearings on H.R. 4231 and S. 706*, 90th Cong., 1st Sess., at 113–114 (August 16, 1967) ; Sen. Rep. No. 472, Committee on Commerce, Federal Martime Discovery Procedures, 90th Cong., 1st sess. (1967). The Commission would, however, readily support a clarifying revision which would bring the "plain language" of section 27 into closer conformity with its actual meaning.

[The following information was referred to on p. 88:]

AMERICAN INSTITUTE OF MERCHANT SHIPPING,
Washington, D.C. October 19, 1977.

Hon. DANIEL K. INOUYE,
Chairman, Subcommittee on Merchant Marine and Tourism, Committee on Commerce, Science and Transportation, U.S. Senate, Washington, D.C.

DEAR SENATOR INOUYE: Enclosed are the replies to twelve questions that you submitted to the Liner Council, American Institute of Merchant Shipping (AIMS) following the testimony of Mr. Thomas J. Smith, President of Farwell Lines, before the Merchant Marine Subcommittee of the Senate Commerce Committee on October 13, 1977.

We reiterate that the Liner Council addresses the anti-rebating provisions of S. 2008, and left individual members of the Council free to express their views on amnesty. Delta Line for example, wishes to make it clear that their answers to the attached questions would be consistent with the testimony of Capt. J. W. Clark.

Very respectively,

ALBERT T. CHURCH, Jr.,
Executive Secretary, Liner Council.

Enclosure.

QUESTIONS PRESENTED BY SENATOR INOUYE TO THOMAS J. SMITH FOLLOWING HIS TESTIMONY FOR THE AMERICAN INSTITUTE OF MERCHANT SHIPPING (AIMS) LINER COUNCIL ON S. 2008

Question 1. It has been suggested that the ultimate solution to the rebating problem may be a series of separate agreements or treaties between the U.S. and each of its trading partners. Would you comment on this approach.

Answer. From discussions with John Hardy, Subcommittee Counsel, we understand that this question is prompted at least in part by a recommendation from the Department of State that the best way to assure cooperation from foreign-flag carriers in FMC rebating investigations is through government to government negotiations conducted by the State Department.

During recent years the Office of Maritime Affairs at the State Department has taken a more affirmative attitude with regard to U.S.-flag shipping. However we do not believe that negotiations of this type would produce anything other than intolerable delay and continued discrimination against U.S. flag carriers in the application of existing anti-rebating laws. In this regard it is important to remember that many, perhaps most, of the foreign laws which prohibit liner operators from responding to FMC discovery prceedings, were enacted during the 1960s specifically so that foreign carriers would not have to respond to FMC subpoenas.

Accordingly, we believe that such negotiations would be fruitless and that legislation such as the anti-rebating provisions in S. 2008 are necessary.

The AIMS Liner Council concurs with testimony on S. 2008 which pointed out that rebating is usually induced by over-capacity in a trade. In foreign trades where there are controls on over-capacity, such as closed conferences, rebating is a relatively minor problem. The members of the Liner Council all agree that the only completely effective and permanent cure to the rebating problem is the adoption of laws which prohibit the "dumping" of excess capacity into the U.S. trades. This "dumping" is exacerbated by the fact that with one or two minor exceptions, all other countries support the closed conference system. As a result, when excess capacity develops on any trade route worldwide the only place where it can usually be "dumped" is into the U.S. liner trades. Equal access agreements and other commercial bilateral type agreements can be effective in controlling over-capacity as has been demonstrated in some of our South American trades during recent years.

We do not mean to suggest at this time that equal access agreements and/or closed conferences are the only cure for the over-capacity problem but certainly they are far better than the independent action approach. We look forward to working with your Committee and the Administration on this problem in the near future.

By the near future we would hope to get started in 1978. The United States has recognized the absolute necessity to curtail the "dumping" of airline services into our trades and is rapidly becoming aware that "dumping" of other goods such as steel must be curtalied. Action must be taken in the maritime field before our liner industry is destroyed.

Question 2. Is it your understanding that S. 2008 in and of itself will not remedy the illegal rebating situation? Rather it provides a mechanism of 3 years duration to find a solution to the problem?

Answer. The enactment of S. 2008 in and of itself will not remedy all illegal rebating. Much of the rebating affecting U.S. trades takes place in foreign countries, where it is legal and often virtually impossible to prove. As we have noted elsewhere in these comments, the AIMS Liner Council is convinced that the only complete and permanent cure to the rebating problem is to remove the prime cause of rebating, which is over-capacity. This can be achieved only by placing limitations on the ability of foreign carriers to dump excess tonnage into U.S. trades.

However, we do believe that the enactment of S. 2008 would make rebating far more risky and thus give pause to those tempted to engage in malpractices.

We urge the prompt enactment of the anti-rebating portions of S. 2008 and believe that they should remain in force and effect until a comprehensive program to limit over-capacity in the U.S. trades has been implemented.

Question 3. The FMC in its testimony recommends that amnesty be conditioned upon full disclosure of all of the names of the persons receiving or paying the rebates in question.

(a) Would you comment on the Commission's recommendation?

Answer. As stated in our testimony on October 13, the Liner Council of AIMS takes no position either pro or con with regard to the amnesty provisions of S. 2008. Accordingly, we do not feel that it is appropriate for the Liner Council to respond to this question.

Question 4. Does AIMS support S. 2008 if it is amended as you suggest?

Answer. The AIMS Liner Council supports the enactment of the anti-rebating portion of S. 2008. We would prefer that the Amendments we suggested in our testimony of October 13 be incorporated in the final bill. As we stated in our testimony the Liner Council takes no position pro or con with regard to the amnesty portions of S. 2008.

Question 5. On page 4 of your testimony you recommend that S. 2008 be amended so that shippers, agents, and employees of shippers be made respondents in any proceeding under Section 2 of the bill.

(a) Inasmuch as 'port closing' would not be an appropriate penalty for these classes of persons, what penalties should the bill prescribe?

Answer. Since these classes of persons would not be subject to the draconian penalty of "port closing" we suggest that legislation authorize much heavier fines for rebating offenses by shippers, agents, and employees of shippers (including freight forwarders and brokers).

Question 6. (a) Would FMC determinations under the new Section 22(c) of the Shipping Act be governed by the requirements of Administrative Procedure and Judicial Review (Public Laws 89–554 and 90–23)?

(b) Would you support your answer with a legal memorandum?

Answer. It is our unresearched opinion that the requirements of the Administrative Procedure and Judicial Review Acts would both apply. The requirement that these questions all be answered within seven days will not provide time for us to prepare a legal memorandum. We respectfully suggest that the General Counsel's Office of the Federal Maritime Commission might have such a memorandum available.

Question 7. The provisions of S. 2008, and the Amendments it would make to the Shipping Act, 1916, would expire 3 years after date of enactment.

(a) With respect to Amendment #1 which would broaden Section 18(b)(3) of the Shipping Act, is it your intention that the Amendment would expire at the end of the 3 year period?

Answer. As stated in our testimony, the Liner Council of AIMS supports effective and comprehensive anti-rebating legislation. Our member companies are all convinced that the only permanent and complete cure to rebating and other problems affecting U.S. liner trades is reduction of chronic over-capacity. If within three years programs have been adopted which effectively limit over-capacity then our Amendment 1 to S. 2008, and indeed S. 2008 itself—if enacted—could be permitted to expire. If effective new programs have not been implemented, we would continue to support legislation such as that contemplated by S. 2008 with our Amendment 1.

Question 8. On p. 2 of your statement, you state that Amendment #1 is desirable "in order to effectively eliminate as much rebating as possible."

(a) Is it your understanding that the thrust of S. 2008 is to enable the FMC to conduct the investigations and obtain the documentation necessary to make recommendations for a permanent solution to the rebating problem? In other words, S. 2008 is not intended to cure the problem as such.

(b) Since this is the purpose of S. 2008, is it your view that Amendment #1 is desirable in order to achieve the objectives of S. 2008?

Answer. AIMS Liner Council wrote to the Chairman of this Committee and other members of Congress on July 26th. 1977 forwarding a draft anti-rebating bill that is substantially similar to the anti-rebating portions of S. 2008. While it will not cure the basic problem of over-capacity, we believe that anti-rebating legislation such as that contained in S. 2008 would help protect U.S. carriers and shippers.

We have read with care Senator Inouye's statement when he introduced S. 2008 to the effect that he considered this an interim measure to enable the FMC to conduct investigations and obtain the documentation necessary to make recommendations for a permanent solution to the rebating problem. As we testified the Liner Council of AIMS does not take any position pro or con with regard to the amnesty provisions of S. 2008 and these are the provisions which primarily relate to the obtaining of documentation necessary to make recommendations for a permanent solution. Accordingly we cannot be completely responsive to your question. However, we wish to emphasize our support for the enactment of the anti-rebating portions of S. 2008, with amendments such as those we proposed in our testimony. We need the best possible bill to deter rebating now, while at the same time providing time for the ultimate solution to the over-capacity at the earliest possible date.

Question 9. Amendment # 2 which you suggest would require persons "controlling", "controlled by", "under common control", or "affiliated" with a respondent carrier to comply with depositions, etc. required by the FMC.

You state that this amendment is necessary if the FMC is to effectively police rebating".

(a) So. 2008 is intended to enable the FMC to conduct the investigations and obtain the documentation necessary to make the recommendations for a permanent solution to the rebating problem. In view of S. 2008's purpose therefore is Amendment # 2 necessary. If so, please explain.

Answer. See answer to question 8 above.

We should point out that our testimony as presented differed from that submitted prior to the hearing in that the words "or affiliated" were deleted because the word "affiliated" is almost impossibly vague.

Question 10. Amendment # 2 provides that a carrier would neither be barred from entering a U.S. port nor its tariffs suspended, if it was its agent or affiliate

who refused to comply with FMC discovery orders, provided the carrier terminate that agency or affiliation promptly upon notice of such non-compliance. Would AIMS object, if instead of the provision it recommends, S. 2008 were amended to make tariff suspensions and port closings discretionary? The FMC could then take into account whether the agency was terminated, etc. in exercising its discretion.

Answer. AIMS Liner Council would not object to making tariff suspensions and port closings discretionary. In fact, we made such a recommendation in our testimony presented on October 13, 1977. (See also answer to Question 9.)

Question 11. Amendment # 3 would require carriers and shippers to certify periodically under rules and regulations promulgated by the FMC that they are not offering or accepting rebates.

(a) Does the Shipping Act now give the FMC authority to impose such a requirement?

(b) How could a Chief Executive Officer of a liner company certify that his agent in Hong Kong was not rebating? In this connection, is it correct to say that if he made a diligent inquiry and investigation and then certified, he would have complied with the law even if his Hong Kong agent were in fact rebating? IF this is so, what standard would determine "diligent inquiry"?

Answer. (a) We regret that we have not had time to research this question but respectfully suggest that the General Counsel of the Federal Maritime Commission might be able to supply a quick response.

(b) Our intention is that the Chief Executive Officer would make his certification to the best of his knowledge and belief after "diligent inquiry and investigation". Obviously there are circumstances in which it would be in the economic self-interest of an agent to offer a rebate despite the most stringent prohibitions posed by his principal; equally obviously, the principal should not be held liable under such circumstances.

The term "diligent inquiry" is obviously open to a number of definitions. We believe that it should impose strict but not unreasonable obligations on corporate executives. AIMS Liner Council deliberately adopted this term from the language incorporated in the anti-rebating amendment to the fiscal year 1978 Maritime Authorization Act. We would be willing to accept any reasonable definition of this term which the Committee might choose to include in the report accompanying S. 2008.

Question 12. (a) How many companies have U.S.-flag ships in our liner trades? Would you please name them.

(b) Of these companies, how many does AIMS represent?

(c) Of this number, how many are you speaking for today?

Answer. (a) At the present time 13 companies operate U.S. flag liner vessels in our foreign trade. They are American Export Line, Inc., American President Lines, Ltd., Central Gulf Steamship Corp., Delta Steamship Lines, Inc., Farrell Lines, Ltd., Central Gulf Steamship Corp., Delta Steamship Lines, Inc., Pacific Far East Line, Inc., Prudential Lines, Inc., States Steamship Company, Sea-Land Service, Inc., United States Lines, Inc., Waterman Steamship Corp.

(b) Nine.

(c) Nine (except where an individual line testified otherwise; e.g. Delta Line.)

[The following information was referred to on p. 114:]

TERRIBERRY, CARROLL, YANCEY & FARRELL,
New Orleans, La., October 17, 1977.

JOHN D. HARDY, Esq.,
Subcommittee on Merchant Marine and Tourism, Committee on Commerce, Science and Transportation, Carroll Arms Hotel, First and C Streets NE., Washington, D.C.

DEAR MR. HARDY: I wish to express, on behalf of Captain Clark, our appreciation for the consideration of his testimony by the Committee on the Hearing on S. 2008 and for the opportunity to respond to the questions posed. Since Captain Clark remains out of the country, we are transmitting the answers herewith.

We would be most pleased to assist the Committee in any manner possible.

Yours very truly,

EDWARD S. BAGLEY.

Enclosures.

Question 1. On page 4, you state that the alternative sanction you recommend would not involve any government-to-government confrontation.

Suppose the offending carrier against whom sanctions were imposed were owned in whole or in part by a government?

Answer. Any effort to effect a closing of a United States port to the vessel of another nation will constitute an immediate and clear refutation of our adherence to the principle of the freedom of the seas. It would cause a direct confrontation between our government and that of the carrier involved. It could not be viewed in any manner other than one which would invite an equivalent closing of the ports of the nation against which the order was directed.

The scenario could be stated as follows:

"The United States has closed its ports to a carrier of our nation because that carrier would not produce documents in violation of our laws against the production of those documents located in our nation."

While any order issued by our government which involves, even indirectly, the government of another nation may be (at least arguably) a government-to-government confrontation. I do not believe that would exist under the proposal submitted with my testimony. The only order which would be issued by the Federal Maritime Commission, would be issued against the domestic agents. It would not deal with the foreign flag carrier which, without agency function, would be free, at least theoretically, to continue its service.

With this preamble, I would urge that it is and has been the policy of this country to treat commercial carriers on an equal basis whether owned in whole or in part by the government of another nation. I do not think that our philosophy permits a different approach here. Once it is recognized that the carrier, whether or not state owned, is existing as a commercial entity, it should be so regulated. Any other or different regulation plainly would discriminate against the carriers of the United States and of the other free-world nations.

Question 2. You state that there is no assurance that the documents, etc. which would have to be produced from abroad under S. 2008 would be accurate.

Would there be any further assurance under your alternative proposal?

Answer. I would like to have, but cannot offer any "truth serum". Neither under S. 2008, nor under the Delta proposal, will the documents produced rise above the integrity of the persons producing them. There, accordingly, is no "further assurance" under my proposal as to the integrity of the documents produced. I do believe, however, that there is some benefit to be gained from the ability to obtain production of such documents.

The differential between rebating and producing accurate documents is, perhaps, a rather fine one. Although a carrier of another nation may fail to recognize the unlawful nature of a rebate, perfectly lawful under its own system of laws, the officers of that carrier may well consider that a perjured affidavit is not to be viewed in the same light. Thus, I do not believe that officers of responsible carriers of the British, German, Japanese, Scandinavian and other countries which have similar standards of personal integrity would furnish falsified records.

Question 3. Under your alternative proposal "the primary responsibility" of effecting production of documents, etc. of foreign-flag carriers would be on the U.S. general agents and subagents.

(a) Why would these agents be able to produce documents when the laws of a foreign country prohibit their production?

Answer. My proposal does not envision that the "primary responsibility" would be on the United States agents. They are simply given notice of the discovery procedures when these are filed. Such notice will give them an opportunity to urge that their principals proceed with the necessary production; responsibility for production will remain entirely with their principals.

The agents, at the same time, are of vital importance to the carriers whom they represent. The functions which they would serve under my proposal include the following:

(i) The agent, in recognition of the common economic interests of itself and its principal, will be in the best possible position to point out forcefully to the principal that the problem requires the immediate attention of the principal in a prompt and effective manner. Delta has been involved in a protracted and wholly ineffective State Department/Federal Maritime Commission proceeding to enable it to carry cargo in the U.S./Guatemala trade where, despite the lapse

of years, nothing has been resolved. This is an example of the futile nature of such government-to-government confrontations. The loss of agency representation, on the other hand, would be an immediate sanction and, as an economic remedy, would be vastly superior to any other action which our government could undertake.

(ii) It is my impression, and I do not believe that the Committee has a different concept, that the laws, regulations or other edicts under which foreign governments have forbidden production of documents or other records by their national lines have been largely, if not wholly, the product of the petitions by those national lines. This, obviously, has been a very effective protective cloak. At the same time, we would submit that these prohibitions can be removed as readily as they were initiated, i.e., if the national flag carriers consider it important to do so, they can petition their own governments to remove the restrictions. On the other hand, if such a carrier found itself unable to obtain this relief, it would simply have to maintain its records in a *situs* which permitted their production in response to the requirements of the U.S. law. Again, I repeat that it is not a matter of the agents being able to produce the documents, but of their being able to impress their principals with the necessity to do so and the ability of their principals, if so motivated, to make such production.

Question 3. (b) In the case where the laws of a foreign country prohibit production of documents, wouldn't an agency of the Federal Government be in a better position to negotiate their production, than a private citizen such as a U.S. agent?

Answer. I do not believe that "negotiation" of production is a useful device. As has been pointed out in the testimony before this Committee, negotiation has been conducted to the point where the statute of limitations has run. Where there is no power of compelling production, negotiation obviously can go on interminably and my proposal does not suggest or contemplate such "negotiation".

Carriers in our ocean commerce do not seek anything from the FMC or the Department of State. On the other hand, their agents in this country are essential to their economic well-being. If they are denied the use of those agents, they will not be able to remain in effective competition for cargoes moving in our trades.

Question 3. (c) Under your proposal, a U.S. agent would have to cease representing a foreign flag carrier if that carrier did not give him its documents, etc., to produce.

What effect would this lack of representation have on a foreign-flag carrier?

Answer. It is possible (but only theoretically) for a carrier to remain in operation without domestic agents. It could not remain a competitive entity without the solicitation, booking and other services offered by its domestic agency on which it must rely.

To trace a purely hypothetical voyage, without such a domestic agent, it would be possible for the carrier, through its vessel master:

(i) To obtain a pilot (with payment in cash);

(ii) To proceed to an anchorage with the pilot;

(iii) To arrange with the local port authority for the assignment of a berth (for cash);

(iv) To hire a stevedore to unload the ship (for cash); and,

(v) To land the cargo and notify the receivers that the cargo was at their disposition.

After a period of several weeks, the vessel master then could expect that the receivers—or a majority of them—would have picked up their cargo, surrendered their bills of lading, and furnished appropriate receipts to discharge the carrier's liability. During these weeks, the vessel would have remained in port. It would not have acquired an outward cargo—absent solicitation by its agent—and it is not likely that any commercial tonnage whatever would have materialized * * * recognized that this is purely a theoretical possibility and that it would be wholly impossible for the carrier to even contemplate continuing operation in a common carrier service without the benefit of a domestic agent.

Question 4. Isn't it true that most of the documents, etc. which the FMC might want from a foreign-flag carrier, in connection with rebating, would not be located in its U.S. offices, or the offices of its U.S. agent?

Answer. The answer to this under either my proposal or S. 2008 as originally written, is in the affirmative. The only exception would appear where, as indi-

cated as one possibility under 3(a)(ii) above, the carrier to avoid agency problems elected to maintain its records in this country.

Again, I would urge that even my proposal does not offer a guarantee against rebating. At most, it would serve—on a commercial basis—to inhibit such action; further eliminating of rebating, in my view, lies with other commercial steps. I would also like to emphasize that commercial solutions should not be looked upon as immoral, illegal or otherwise inappropriate to the commercial problems which must be dealt with in our foreign ocean transportation.

Question 5. You oppose the amnesty provisions in S. 2008 on several grounds. Since the life of this provision would only be one year, why do you say it will eradicate the sanctions against relating from the law, and that a rebater who was "caught" rather than "confessed" could expect amnesty?

The provision in S. 2008, provides for neither of these results.

Answer. The amnesty provision is one which I believe is subject to a number of basic defects:

(i) There is no *quid pro quo* or other benefit or advantage to be derived from the grant of amnesty here.

(ii) The parties who have engaged in rebating have obtained substantial benefits from their practices which they retain and will continue to retain. It is offensive to suggest that they may continue to receive those benefits, unlawfully obtained, without fear of sanctions. Delta simply is not in a position to accept the fact that these "sinners" should be accepted back into the fold, retaining the past, present and future rewards of their unlawful actions without being subject to sanctions.

I feel that amnesty here represents a principle which is wholly inconsistent with the sanctions provided by the Shipping Act, 1916. I cannot help but believe that any wiping out of sanctions for past violations will serve to encourage continued and future violations. Ocean transportation is a difficult and highly competitive business; it is impossible to tolerate or condone the action of rebaters.

The foregoing applies to all violations of the Act, whether civil, criminal, past, present, "caught" or "confessed."

If it is the desire of the government to abandon a law, amnesty for past violations may well represent a worthwhile step in that direction. It is our understanding that the proposed amnesty for past violators of our immigration laws has resulted in increased influx in new illegal immigrants. The thought obviously is that their violation of our laws will in all probability, be the subject of a future amnesty. We do not feel that we need to encourage further violations by prospective rebaters.

There are a number of provisions of S. 2008 which leave us quite uncertain as to its effect of rebaters who were "caught." The objection of Delta here, however, has nothing to do with "caught" or "confessed," but is directed toward the basic principle of amnesty as it is sought to be directed against violations of a statute which has been in existence for more than 60 years. These violations are not a case fo uncertainty as to what the law requires, but are a clear, intentional flaunting of the law to gain competitive advantage over Delta and other carriers similarly situated. It is wholly repugnant to have such a license granted on any basis.

Question 6. On page 6, you state that the allegation by representatives of one U.S. flag carrier that rebating in our liner trades is wide spread is a "smear tactic."

Are you familiar with the record of the committee's rebate hearings in March of this year? I believe you will find several eminent authorities, including the then chairman of the FMC, who maintain there is widespread rebating in our liner trades.

Answer. To say that the practice is widespread in our trades is something which I can accept and, indeed, I would regard the Sea-Land rebates of $19-million over five years as widespread rebating, standing by itself. This, however, is not the problem which we have had with the various press releases and interviews with the media which have been conducted by Sea-Land personnel.

Examples of what we consider to be "smear tactics" include the following:

"On May 28, Reynolds announced * * * that a preliminary investigation within Sea-Land disclosed 'practices which it described as traditional in the international shipping industry, but which nevertheless violated company policy and Federal law.'" *Winston-Salem Journal*, January 5, 1976.

"Reynolds, in its filing, describes how pervasive rebating is in the industry. It says that, in the mid-1960's, before it was acquired by R. J. Reynolds, Sea-Land tried to compete without paying rebates.

" 'We understand Sea-Land found that many shipper expected rebates and almost every foreign and domestic carrier apparently paid them,' Reynolds told the SEC." *Washington Post*, September 11, 1976, (similar articles appeared in the New York Times and Washington Star at the same time).

"Sea-Land rebated because everybody does it in transoceanic shipping." September/October 1977 issue of *The SOUTH Magazine*.

Delta takes strong exception to these efforts by Sea-Land to justify its actions through the "everybody does it" or "almost everybody does it" statements. It is damaging the reputation and business interests of carriers such as Delta which have not engaged in these practices and, as I had pointed out in my Testimony, it certainly does not enhance the prospects that the FMC will be able to obtain adherence to our laws where this major U.S. carrier effectively is declaring that nobody obeys them.

[Telegram]

DELTA U/S LINES, INC.,
New Orleans, La., October 20, 1977.

JOHN D. HARDY, Esq.
Subcommittee on Merchant Marine and Tourism, Committee on Commerce, Science Transportation, Washington, D.C.

I have just returned New Orleans from Buenos Aires. On reviewing communication of Oct. 17, 1977 prepared by Edward S. Bagley, I am pleased confirm my concurrence with response prepared to committees' questions related my prepared statement presented Oct. 13, 1977 by Messers. R. E. Hunter and E. S. Bagley. This response accurately presents my views.

J. W. CLARK,
President.

[Memorandum]

To: Members of the Maritime Task Force.
From: Fred Peterson.
Subject: Maritime Task Force in High Gear (or at Flank Speed).

I made a progress report to the Domestic Council Review Group (DCRG) on Wednesday, September 24. They accepted our draft outline and reporting schedule, which are attached: so we are now committed to working intensively between now and December 17. Let's not waste any time. Our next meeting is on October 9. Send in your materials three days before the meeting if you want me to distribute them. Those of you who do not yet have assignments should read up on maritime regulation to facilitate your participation in meetings and to give you a head start when you are asked to study a policy option under Tab D in the outline. I would be happy to suggest some readings. I trust that all of you have, by now, submitted comments on the draft papers. Thanks again for your participation.

Attachments.

SCHEDULE AND WORK PLAN FOR MARITIME TASK FORCE

FRIDAY, SEPTEMBER 19—10 A.M.

TF meeting in Room 305 OEOB.
Presentation of Tab A draft by FP, PW.
Presentation of Tab B, parts 1 and 2, draft by MG, RN.
Discussion of outline and schedule/wor plan for TF.

WEDNESDAY, SEPTEMBER 24

Progress report presented to the DCRG.

THURSDAY, OCTOBER 9—10 A.M.

TF meeting in Room 305 OEOB.

Full draft of Tab A presented by EA.
Full draft of Tab B presented by MG, RN, PF, EA, RB.
First draft of Tab C presented by PF.

THURSDAY, OCTOBER 21—COB

Final drafts of Tabs A through C due in FP's office.
(Sections of Tab B may be submitted separately; so it is not necessary for writers of the various sections to coordinate with each other.)

THURSDAY, OCTOBER 23—10 A.M.

TF meeting in Rom 305 OEOB.
Draft of Tab D, parts 1 through 3 presented by JG Policy options discussed and selected. Teams organized.

WEDNESDAY, OCTOBER 29

Interim report made up of Tabs A through C presented to the DCRG. Policy options presented.

THURSDAY, NOVEMBER 20—10 A.M.

TF meeting in Room 305 OEOB.
Final draft of Tab D, parts 1 through 3 presented by JG.
Drafts of Tab D, part 4 presented by teams. (An extra, afternoon session may be required.).

THURSDAY, DECEMBER 4—10 A.M.

TF meeting in Room 305 OEOB.
Final drafts presented by teams. Draft of Memorandum to the DCRG presented by FP.

WEDNESDAY, DECEMBER 10—COB

Final changes in all materials due in FP's office.

THURSDAY, DECEMBER 11

Possible extra meeting to discuss report to the DCRG.

WEDNESDAY, DECEMBER 17

Presentation of report to the DCRG.
Decision made on further activities of the TF.
1. To keep the total report down to 200 pages double spaced, try to observe the page limits given in parentheses in the Draft Outline.
2. All Tabs and other materials to be discussed should be delivered to TF members at least two days before meetings.
3. Check with Paul Westcott if you are having trouble obtaining data on materials for your chapters. He may have them at CEA or know where to find them.

[Memorandum]

To: DCRG members.
From: Paul Macavoy.
Subject: The Maritime Task Force.

The Maritime Task Force has prepared a progress report to be discussed at our meeting this Wednesday, September 24. A copy of their report follows so that you will have a chance to read it.

BACKGROUND

In the DCRG meeting on August 6, it was decided that Jim Golden, of CEA, would organize a task force to study the maritime industry. Since then, Jim has returned to West Point, and his responsibilities have been assumed by Fred Peterson, also of CEA. Jim continues to participate in task force meetings but cannot devote full time. The task force met on August 22, September 5 and September 19 and wishes to report their progress to the DCRG at this time.

MEMBERSHIP

Attachment A lists the current membership of the Task Force. It is expected that members will be added from the Departments of State and Commerce, but no representation from the Federal Maritime Commission (FMC) is anticipated. Since the FMC is the agency primarily affected by the study, their participation is a critical matter, and an opinion or judgment from the DCRG would be welcomed.

OUTLINE OF STUDY

So that the DCRG will know where the Task Force is heading and will have an opportunity to direct it, a draft outline of the final memorandum is attached. The memorandum will describe the Task Force, summarize its findings, and present its policy recommendations. It will be self-contained and about twenty-five pages in length. Tab A will present the structure of the ocean shipping industry, describe how it conducts its business, and identify the role of the U.S. Tab B will describe the role of the FMC and other government agencies in maritime affairs. Tab C will explain why the regulatory sections of the Shipping Act were passed into law and analyze the economic benefits and costs of each section. The analysis will necessarily be verbal and qualitative for the most part, with small amounts of quantification. Tab D will discuss the various policy options in the regulatory area and how they interact, analyzing three policy packages for their economic, legal, international, and domestic political impacts.

REPORTING SCHEDULE

Unless otherwise directed, the Task Force will make two reports to the DCRG:

Wednesday, October 29. An interim report will be made up of materials from Tabs A through C. This will give the DCRG a general picture of the ocean shipping industry and where policies stand today. The set of policy options that the Task Force plans to study will also be presented.

Wednesday, December 17. The main memorandum will be presented. Copies of Tabs A through D will be available to those who want to read them. The total length of the report should be about 200 pages.

IMPACT OF THE STUDY

It is difficult to anticipate what the findings or policy recommendations of the study will be, or what they will be used for, but it can probably be said that:

1. The study will provide background information about various maritime issues of current concern.

2. It will suggest some changes in FMC practices that might be accomplished without legislation, such as interpreting dual rates as being "contrary to the public interest" under section 15 of the Shipping Act or allowing more price flexibility on domestic offshore trade, under section 18.

3. Some changes in legislation will be suggested, although the Task Force probably will not generate sufficient analysis by December 17 to support a bill in the Congress. There might also be problems with writing legislation before FMC has a chance to contribute ideas, or at least rebut the Task Force report. Suggested legislation could range from minor changes in the law requiring verbatim transcripts of all discussions between carriers, as was suggested by Donald Flexner, to radical changes, like removing antitrust immunity and abolishing most functions of the FMC.

It is emphasized that the Task Force is focusing on maritime *regulation*. They do not feel that they have the resources, the time, or the mandate to study the wide range of maritime *promotional* issues, like shipbuilding subsidies and cargo preference.

ATTACHMENT A

TASK FORCE MEMBERS

Ed Antoun, DOC; Richard Bank, State; Phil Franklin, DOT; Jim Golden, Consultant; Milton Grossman, Justice; Nate Hayward, OMB; Jim Miller, CEA; Wilbur Monroe, CIEP; Roy Nierenberg, COWPS; Fred Peterson, CEA; Dave Qualls, FTC; Ken Schwartz, OMB; Paul Westcott, CEA.

DRAFT OUTLINE OF REPORT BY THE MARITIME TASK FORCE

Memorandum—*Introduction and Summary* (25 pages).
1. Description of Task Force.
2. Summary of Findings.
3. Summary of Recommendations.
Tab A—*The Structure of the Ocean Shipping Industry* (25 pages).
1. The Definition of Markets by Route and Type of Cargo.
2. The Size Distribution of Shippers, Freight Forwarders, and Carriers in Various Markets, with Special Reference to the Role of the U.S. in these Markets.
3. The Economics of the Industry, Fixed and Variable Costs for Various Technologies, and Possible Tendencies Toward Instability.
4. The Conduct of the Industry, How Prices and Outputs are Determined.
(a) The Conference System.
(b) The Role of Shippers' Councils.
(c) The Effect of New Technologies.
Tab B—*The Role of the Federal Maritime Commission (FMC) and other Federal, State and Local Agencies* (35 pages).
1. A Synopsis of Maritime Laws.
2. A Description of the FMC and its Activities.
3. Intercoastal and Intermodal Transportation, the Role of the ICC and Its Interaction with the FMC.
4. Construction, Operating, and Tax Subsides, Cargo Preference, Cabotage Laws, and the Role of the Maritime Administration.
5. National Interests, Maritime Bilateral Agreements, UNCTAD and Other International Maritime Negotiations, the Interaction of the State Department and the FMC.
6. Safety, Marine Pollution and the Role of the U.S. Coast Guard.
7. Other Federal, State, or Local Government Activities. (Port Administration, Taxes on Bunker Fuel, etc.)
Tab C.—*A Mandatory and Analysis of Marine Regulatory Statutes* (20 pages).
Taking sections 14 through 19 of the Shipping Act of 1916, as amended, it will be asked:
1. Why was this section of the law written?
2. Were the goals valid?
3. Are the goals still valid?
4. What are the costs imposed by the section? (Dollar estimates will be made where possible. Otherwise, costs will be described qualitatively, within an economic framework.)
5. On balance, do the benefits of the section outweigh the costs?
Note: The writer may split up or combine the sections of the Act as the analysis indicates. The section by section breakdown presented here is merely suggestive.
Tab D—*The Options for Change* (100 pages).
1. A List of Possible Actions.
2. How the Actions Interact.
3. Synthesis of Three Broad Policy Options for Further Study.
4. Each Policy option selected will be analyzed by a team. Their report will include but not be limited to:
(a) An Economic Analysis.
(b) Legal Considerations: The Flexibility of Present Laws, The Need for New Ones, The Efficacy of Antitrust Actions Against Shipping Lines, etc.
(c) International Repercussions of the Option and Strategies for Amelioration.
(d) Domestic Political Considerations, Strategies and Feasibility.

THE STRUCTURE OF THE OCEAN SHIPPING INDUSTRY

(By Fred Peterson and Paul Westcott)

The ocean shipping industry is extremely important in that it carries the bulk of the world's international trade and has played a critical role in the defense of nations. Certain segments of the industry have traditionally been uncompetitive and subject to the control of regulatory agencies, like the Federal Maritime Commission (FMC) of the United States. In the following chapters, we study the structure of the industry, examine its behavior, and review the ac-

tivities of the FMC and other Federal agencies involved in maritime affairs. In this chapter, we examine the composition of the world fleet, the segmentation of shipping markets, the economics of shipping, and the institutional structure of the industry.

A. THE WORLD FLEET

The world merchant fleet is comprised of some 472 million dead weight tons (dwt),[1] which are distributed among the flags of the world according to Figure 1. With only 13.9 millon dwt, less than 3 percent of the fleet, the U.S. would not appear to have much of a role, but U.S. *parent companies* own or control an additional 47.9 dwt flying the flags of different nations, the so called "effective control" fleet, bringing the total to 61.8 million dwt, or 13 percent of the fleet. See Table 1.

Table 1 emphasizes "the many types of ships, each with its own markets. The table breaks the effective control fleet down into tankers, freighters. and bulk/ore carriers. The freighter classification is usually broken down further into intermodal ships, combination cargo and passenger ships, and ordinary freighters. Table 2 gives such a breakdown for the U.S. merchant fleet—private and government owned, active and inactive. Freighters also differ by the type of service offered. *Liners* travel regular routes and maintain regular schedules, while *tramps* follow no set schedule. As far as United States water borne trade is concerned, liners accounted for only 9 percent of the tonnage entering or leaving our ports in March, 1975, while tramps carried 53 percent and tankers 38 percent.[2] Liners, however, tended to carry lighter valued cargoes, such as automobiles and airplane parts, while tramps carried high volume, bulk commodities like iron ore and grain.

B. THE SHIPPING MARKETS

Worldwide, the ocean shipping industry loaded 3190 million metric tons (mt) of cargo in 1973, of which 1841 mt were carried in tankers and 1349 mt in dry cargo vessels. The U.S. loaded 250 mt and unloaded 422 mt.[3] reflecting the fact that, on balance, our country is an importer of large tonnage raw materials and an exporter of lighter, higher valued manufactured goods, despite our heavy exports of raw agricultural products.

To study shipping markets, one has to focus on particular types of ships offering specific types of services on specific shipping routes. Since the tanker and tramp markets are competitive and since the FMC regulates only liners, we shall focus of liners serving U.S. ports. A typical U.S. trade route runs from the Gulf coast to the west coast of Africa or from the east coast of South America to the North Atlantic coast of the United States Tables 3 and 4 show liner exports and imports between various parts of the U.S. coast and other parts of the world in March, 1975. Not surprisingly, the largest amount of traffic passed through North Atlantic coast ports. U.S. flag carriers get about 30 percent of our liner trade, thanks to various subsidies, and cargo preference laws to be discussed later, but they get considerably smaller percentages of our tramp and tanker trade.[4]

C. INDUSTRY ECONOMICS

The trend over the last decade has been toward building larger and faster ships. For these larger ships, the building costs per dead weight ton are not as high, the increase in required crew size is less than proportional, there are lower per unit port costs, and there are lower management and insurance costs.[5] Thus, even though the total costs of building and operating these ships are higher, the economies of scale allow carriers to operate at lower unit costs. Technological change has brought more capital intensive shipping to the industry in the forms

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[1] Deadweight tons (dwt) described the cargo lifting capacity of a ship in tons of 2,240 pounds. It is the displacement of the ship fully loaded minus the displacement of the ship empty. Gross tons and net tons actually measure the volume of a ship, subtracting off for certain spaces and using a conversion factor of 100 cubic feet per ton.

[2] U.S. Department of Commerce, Bureau of the Census, *U.S. Waterborne Exports and General Imports,* March 1975 (Washington: Bureau of the Census, August 1975) Tables E2 and I2.

[3] U.N. Department of Economic and Social Affairs, *Monthly Bulletin of Statistics,* Vol. 29, January 1975) Special Table D.

[4] See footnote 2. The Energy Transportation Security Act of 1974, Vetoed by the President, would have substantially increased the U.S. share of tanker cargos, if sufficient tanker capacity was available.

[5] B. N. Metaxas, *The Economics of Tramp Shipping* (London: The Athlone Press, 1971).

of intermodal equipment such as container ships, roll on-roll trailers, and seabee and lash barges.

These changes have also affected the cost structure of the industry. Variable costs, mainly loading and labor costs, have fallen, while fixed costs of capital investment have risen. The former outweight the later so that total costs have fallen. For example, 1970 total shipping costs per 1,000 tons cargo on a conventional 14,000 dwt. liner were $24.94—$21.61 of which were variable costs; the remaining $3.33 being fixed costs. Total costs per 1000 tons cargo on a more capital intensive 20,000 dwt. containership were $17.15—$12.36 of which were variable costs: the remaining $4.79 being fixed costs.[6]

Even though these technological changes and resulting decreased operating costs should produce long-run decreases in shipping rates, only small changes have occurred so far. Part of this must be attributed to containership operator's membership in conferences. But also prices might not initially drop too rapidly because of the increased risk associated with a more capital intensive industry. Because of the higher investment, a capital intensive industry must have better information about future demand for their service or product over a longer horizon than is needed in a more labor intensive industry. Capital cannot be as easily switched into other uses as labor can, so in a capital intensive industry, the cost of making an incorrect prediction of future demand is higher. Therefore, until containership operators learn more about future demand of their services and hence reduce the uncertainty involved, they will be less likely to substantially lower their rates.

D. INSTITUTIONAL STRUCTURE

The liner markets that we are focusing on are dominated by the conferences. There were formed in the last 19th century by shipowners who joined together to regulate traffic, fix rates, and fight competition from non-members. Steam propulsion, a great technical advance, had led to excess capacity in the industry, perhaps because rates had been sticky in the downward direction. When rates finally did fall, shipowners found themselves near ruin. So the first conference, covering the U.K.-Calcutta trade, was formed in 1875 to protect their interests.[7] There are now over 360 conferences throughout the world, about 40 percent of which involve U.S. ports and are under FMC scrutiny. An FMC publication lists the hundreds of conference agreements and other types of agreements under their jurisdiction.[8] Table 5, which is somewhat outdated, lists the conference agreements that were effective in 1959 and 1962 and indicates the degree of non-conference competition. In testimony before the Joint Economic Committee, FMC gathered figures on the U.S.-North Atlantic—U.K. trade and found that only 2 percent of outbound sailings and 6 percent inbounds were non-conference in 1963. Since nonconference liners can move about and enter trades where rates are particularly high, their competitive impact should not be underestimated. Under the Shipping Act of 1916, conferences in the U.S. trades must freely admit new members, giving the non-conference minority an added degree of freedom. Most non-U.S. conferences are closed.

The conference system in the U.S. trades, with its free entry and elevated rates, can lead to excess capacity such as has existed in the North Atlantic container trade. To fend off the threat of price wars, conferences sometimes go beyond rate fixing and try to set up cargo sharing or revenue pooling agreements. Under cargo sharing, an agreed upon percentage of each type of freight is allocated to each conference member. Revenue pools base the division on revenues rather than tonnages, making sure that each member does his share of the work and does not concentrate on high revenue cargos. The North Atlantic Container Pool, agreement 10,000, before the FMC,[9] is one such pooling attempt. It has not been approved thus far and does not seem likely to be. FMC has approved a number of bilateral pooling or cargo sharing agreements that were set up at the diplomatic level, especially with Latin American countries.[10]

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[6] S. A. Lawrence, *International Sea Transport; The Years Ahead* (Lexington, Mass.; Lexington Books, 1972) Table 7-4.

[7] For a history of the conferences, see: B. M. Deakin, *Shipping Conferences* (Cambridge: Cambridge University Press, 1973) Ch. 2.

[8] Federal Maritime Commission, *Agreements* (Washington: Federal Maritime Commission, September 1, 1975).

[9] U.S. Department of Transportation, *Agreement No. 10,000—North Atlantic Pool*, Docket 72-17, Brief before the Federal Maritime Commission (Washington; U.S. Department of Transportation, May 4, 1973).

[10] Federal Maritime Commission, Section 7 (Washington: Federal Maritime Commission, September 1, 1975).

The most important development in the maritime industry over the last 15 years has been the intermodal transport system. Containerization, which constitutes the majority of the current intermodal capacity, has the potential to affect the organization of the maritime industry, especially the conference system. As indicated before, the long-run effects of containerization have not yet been seen because container firms, with their high capital investment and associated high risk, will be hesitant to lower their rates until they can accurately predict future demands. And container operators probably find it to their advantage to remain in a conference, under the protection of the conference's high rates, until they obtain greater information about future demands.

But what will happen while the container operators are obtaining this information? The high conference rates and low costs of container shipping will create high profits and will attract new firms to the industry. And the resulting excess capacity can create a threat to the strength of the conferences. If the conferences meet this threat by enacting pooling or cargo sharing agreements, the conferences will be strengthened. On the other hand, if no such arrangements are made, the conferences could weaken. To eliminate this excess capacity, container operators might want to lower their rates and might pressure the conferences to lower theirs. Because many conference members could not survive at the lower rates, the conferences might not yield to this pressure. So in order for the container operators to use these lower rates, they might drop out of the conferences and thus weaken the conferences system. There are, of course, other scenarios; so comments and suggestions are invited.

There are other ways that intermodal transportation could affect the conference system. Because of the ease of loading and transportaing containerized cargo, intermodal transportation can lead to cargo diversion from one port to another. That is, if conference rates at one port are very high and there is another port with lower conference rates, a shipper would ship his goods from the second port if transportation costs to that port did not offset the difference in shipping rates. Recently, Seatrain has made such cargo diversions, transporting goods to Charleston, S.C. that have usually been shipped from ports in Texas. Cargo diversion reflects the fact that the ease of intermodal transportation has brought together shipping markets that were previously geographically separated. If the conference involved are forced into price competition to obtain their share of this widened market, the shipping rates should fall and the conferences would be weakened.

Finally, intermodal transport systems could lead to a change in the criteria for rate setting. Because they are presently based on the value of the product being shipped rather than on the actual costs of the carrier, there are hundreds of different shipping rates. Part of the difference in these rates can be attributed to differences in insurance costs needed for different products, but the rest is probably third degree price discrimination. When every container looks the same from the outside and many different products are contained inside, it becomes harder to justify and administer prices based on value. And goods shipped in containers are less likely to be damaged, stolen or lost, so insurance cost differentials should narrow. Hopefully containerization will lead to rates based on the cost of shipment and insurance, as would be dictated by economic theory.

The suppliers of liner cargo capacity are highly cartelized, but the shippers who demand cargo capacity are quite the opposite, at least in this country. There are many diverse users of liner services. Their cargos are consolidated at the shipping point and broken down at the receiving point by freight forwarders and non-vessel operating companies (NVO's), which are under FMC regulatory control. The forwarders and NVO's are themselves numerous, because it takes little capital to get into the business. Organizations of shippers, such as shippers' councils, are not found in the U.S. They are apparently outlawed by our antitrust laws, but shippers' councils play an important role elsewhere in the world, counteracting the power of the conferences and, unfortunately, tending to strengthen and ratify the conference system. Drawn in by the bimonopolistic bargaining situation created by the conference and councils, governments have tended; according to one observer, to step in and become the arbiters, thus bureaucratizing and preempting the market.

THE LIBRARY OF CONGRESS,
CONGRESSIONAL RESEARCH SERVICE,
Washington, D.C., September 20, 1977.

To: Senate Committee on Commerce, Science and Transportation, Attention: John Hardy.
From: American Law Division.
Subject: Foreign Illegality Excuse for Non-Compliance with Federal Law Requiring Disclosure.

Reference is made to your inquiry of September 13, 1977, requesting information on the above matter. Specifically, you ask for a legal memorandum which addresses the question whether a common carrier by water may refuse to comply with a Federal Maritime Commission subpoena *duces tecum*, etc., requiring the production of documents in its possession on the ground that disclosure would contravene foreign statutes or foreign public policy.

As described in the Government Manual:

"The Federal Maritime Commission regulates the waterborne foreign and domestic commerce of the United States, assures that United States international trade is open to all nations on fair and equitable terms, *and guards against unauthorized monopoly in the waterborne commerce of the United States.* This is accomplished through maintaining surveillance over steamship conferences and common carriers by water; assuring that only the rates on file with the Commission are charged; approving agreements between persons subject to the Shipping Act; guaranteeing equal treatment to shippers and carriers by terminal operations, freight forwarders, and other persons subject to the shipping statutes; and ensuring that adequate levels of financial responsibility are maintained for indemnification of passengers or oil spill cleanup." 1977/78 *United States Government Manual* 523, 524 (emphasis added).

The immediate concern prompting your inquiry is a provision in S. 2008, 95th Cong., 1st Sess., which would impose certain not insubstantial disabilities for a failure "to comply with depositions, written interrogatories, discovery procedure, or subpoena issued in relation to an investigation or hearing held under an order issued by the Commission. . . ." The disabilities authorized by the bill include (1) immediate tolling of the 180 day period within which the Commission is required to issue a final order following upon an investigation into a complaint charging certain discriminatory acts (46 U.S.C.A. § 815) or unreasonable rates (46 U.S.C.A. § 817) by a waterborne carrier, (2) summary suspension of all tariffs filed by, or on behalf of, a respondent carrier or any carrier directly or indirectly owned, controlled, or affiliated with the respondent carrier, and (3) the closure of all U.S. ports to the respondent carrier until such time as it "has fully responded to the deposition, written interrogatories, discovery procedure or subpoena involved, *and* the Commission has issued its order in the proceedings. (Emphasis added.)

It is asserted that the described requirements pose a substantial problem in that they mandate disclosure of information in violation of unspecified foreign legal or public policy constraints. Assuming the legislation's constitutionality—a matter which we have no reason to doubt given the pleanary nature of the congressional power to regulate commerce (Art. I, § 8, cl. 3) and to define the admiralty and maritime jurisdiction of the United States (Art. III, § 2) as supplemented by the necessary and proper clause (Art. I, § 8, cl. 18)—the objection raised against it, however sensitive in an international relations context, does not seem to present any insurmountable legal problems.

The following excerpts from 16 *American Jurisprudence* 2d "Conflict of Laws," §§ 1, 4, 5, 6, regarding definitions and general principles, are submitted by way of general background to the main issue raised by your inquiry:

"Conflict of laws is in reality a part of the subject of international law, which is commonly divided into two aspects, public and private. Public international law, or the law of nations is that which regulates the political intercourse of nations with each other or concerns questions of rights between nations, whereas private international law, or conflict of laws, is that which regulates the comity of states in giving effect in one to the municipal laws of another relating to private persons, or concerns the rights of persons within the territory and dominion of one state or nation, by reason of acts, private or public, done within the dominion of another, and which is based on the broad general principal that one

country will respect and give effect to the laws of another so far as can be done consistently with its own in interests. § 1.

* * * * * * *

"No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one state or nation is allowed to operate within the dominion of another depends on what is commonly called 'the comity of nations.' Comity, in the legal sense, is neither a matter of absolute obligation on the one hand nor a mere courtesy and good will upon the other. It has been defined as the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protections of its laws. § 4.

"In considering the question of comity, it should always be borne in mind that the recognition of foreign laws cannot be claimed as a right, but only as a favor or courtesy. Thus, it has been said that the application of comity does not rise to the effect of establishing an imperative rule of law, and that it has the power to 'persuade but not command.' It is permitted and accepted by all civilized communities from mutual interest and convenience, from a sense of the inconvenience which would otherwise result, and from moral necessity to do justice in order that justice may be done in return. . . . Comity, being voluntary and not obligatory rests in the discretion of the tribunals of the forum and is governed by certain more or less widely recognized rules. § 5.

"*In the recognition and enforcement of foreign laws of the courts are slow to overrule the positive law of the forum, and they will never give effect to a foreign law* where to do so would prejudice the state's rights or the rights of its citizens, or *where the enforcement of the foreign law would contravene the positive policy of the law of the forum*, whether or not that policy is reflected in statutory enactment." § 6. (Emphasis added.)

It is clear from the foregoing that while considerations of comity are entitled to significant weight in determining the effect of a foreign law on domestic situations, these considerations are neither obligatory nor dispositive. In particular, in the case of a conflict between foreign and local statutory law, the latter prevails.

The issue raised by foreign criminal or civil laws which prohibit any person from disclosing certain kinds of information or which prohibit removal of business documents to any other jurisdiction, is increasingly finding its way into the courts. By and large, these cases arise in connection with discovery procedures authorized by the Federal Rules of Civil Procedure. Although a number of decisions from the Second Circuit suggest that a district court should not order production of documents and other evidentiary materials if the order would cause a party to violate foreign law, *Trade Development Bank* v. *Continental Insurance Co.*, 469 F. 2d 35, 41 (2d Cir. 1972); *Application of Chase Manhattan Bank*, 297 F. 2d 611 (2d Cir. 1962); *Ings* v. *Ferguson*, 282 F. 2d 149, 152 (2d Cir. 1960); *First National City Bank of New York* v. *Internal Revenue Service*, 271 F. 2d 616, 619 (2d Cir. 1959), they offer little, if any, support for the above assertion since (1) they did not involve a foreign law in direct conflict with "the positive law of the forum," (2) they have been largely superseded by subsequent decisions, including decisions from the Second Circuit, and (3) they are not in accord with the leading case on the subject, *Societé Internationale* v. *Rogers*, 357 U.S. 197 (1958).

The problem in these cases, of course, is accommodating the conflicting principles of the law of the forum and effective enforcement with the requirements of due process and international comity. The problem and its recent emergence to prominance have been explained as follows:

"* * * With the growing interdependence of world trade and the increased mobility of persons and companies, the need arises not infrequently, whether related to civil or criminal proceedings, for the production of evidence located in foreign jurisdiction. * * * The difficulty arises, of course, when the country in which the documents are located has its own rules dealing with the productions and disclosure of business information—a circumstance not uncommon. This problem is particularly acute where the documents are sought by an arm of a foreign government. The complexities of the world being what they are, it is not surprising to discover nations having diametrically opposed positions with re-

spect to the disclosure of a wide range of information. It is not too difficult, therefore, to empathize with the party or witness subject to the jurisdiction of two sovereigns and confronted with conflicting commands. * * *" *United States* v. *First National City Bank*, 396 F. 2d 897, 900–901 (2d Cir. 1968).

The leading, if not the first, case on the subject is *Societé Internationale* v. *Rogers*, 357 U.S. 197 (1958), one of many decisions in the prolonged legal controversy in which a Swiss holding company tried to recover property which had been seized by the Alien Property Custodian during World War II pursuant to the Trading with the Enemy Act. The U.S. Government sought certain records of the Swiss company in order to show that the Swiss company had been controlled by Germans. The plaintiff did not fully comply with the discovery order citing a Swiss penal nondisclosure law and an order of the Swiss Government forbidding the production of the records in question. 357 U.S. at 200.

The lower court held that foreign illegality was not an adequate excuse for noncompliance with the discovery order and dismissed the complaint. During the course of the proceedings, plaintiff sought and received a waiver from the Swiss Government with respect to many, but not all of the relevant documents sought by the U.S.

On appeal, the Supreme Court reversed and remanded, finding that the remedy of dissmissal was not justified in view of the good faith efforts made by the plaintiff to comply with the discovery order. However, the Court made clear that American courts have power to issue discovery orders even where compliance therewith would be illegal under foreign law.

"* * * to hold broadly that petitioner's failure to produce the * * * records because of fear of punishment under the laws of its sovereign precludes a court from finding that petitioner had 'control' over them, and thereby from ordering their production, would undermine congressional policies made explicit in the 1941 amendments, [to the Trading with the Enemy Act], and invite efforts to place ownership of American assets in persons or firms whose sovereign assures secrecy of records. The District Court here concluded that the * * * records might have a vital influence upon this litigation insofar as they shed light upon petitioner's confused background. Petitioner is in a most advantageous position to plead with its own sovereign for relaxation of penal laws or for adoption of plans which will at least achieve a significant measure of compliance with the production order, and indeed to that end it has already made significant progress. United States courts should be free to require claimants of seized assets who face legal obstacles under the laws of their own countries to make all such efforts to the maximum of their ability where the requested records promise to bear out or dispel any doubt the Government may introduce as to the true ownership of the assets.

"We do not say that this ruling would apply to every situation where a party is restricted by law from producing documents over which it is otherwise shown to have control. Rule 34 [of the Federal Rules of Civil Procedure re. discovery] is sufficiently flexible to be adopted to the exigencies of particular litigation. The propriety of the use to which it is put depends upon the circumstances of a given case, and we hold only that accommodation of the Rule in this instance to the policies underlying the Trading with the Enemy Act justified the action of the District Court in issuing this production order." 357 U.S. at 205–206.

That the sanction of dismissal for non-compliance imposed by District Court in the circumstances of the case, not want of power to compel disclosure because of foreign illegality, is the key to the case is apparent in the following remarks: ". . . we think that Rule 37 should not be construed to authorize dismissed of this complaint because of petitioner's non-compliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.

'This is not to say petitioner will profit through its inability to tender the records called for. In seeking recovery of the General Aniline stock and other assets, petitioner recognizes that it carries the ultimate burden of proof of showing itself not to be an 'enemy' within the meaning of the Trading with the Enemy Act. The Government already has disputed its right to recovery by relying on information obtained through seized records of I.G. Farbena, documents obtained through petitioner, and depositions taken of persons affiliated with petitioner. It may be that in a trial on the merits, petitioner's inability to produce specific information will prove a serious handicap in dispelling doubt the Government might be able to inject into the case. It may be that in the absence of complete

disclosure by petitioner, the District Court woud be justified in drawing inferences unfavorable to petitioner as to particular events. So much indeed petitoner concedes. But these problems go to the adequacy of petitioner's proof and should not on this record preclude petitioner from being able to contest on the merits.

On remand, the District Court possesses wide discretion to proceed in whatever manner it deems most effective. It may desire to afford the Government additional opportunity to challenge petitioner's good faith. It may wish to explore plans looking towards fuller compliance. Or it may decide to commence at once trial on the merits. *We decide only that on this record dismissal of the complaints was not justified.*" 357 U.S. 212–213. (Emphasis added.)

It should be noted that while the Court held that dismissal with prejudice was unjustified in the circumstances of this case, it did not rule it out in all cases for failure to comply.

The result in *Societé Internationale* v. *Rogers* is in large measure tied to the Court's finding that plaintiff had made a good faith effort in seeking a waiver from the Swiss Government and in turning over 190,000 documents. Both actions, the Court suggests, are requirements in seeking a resolution in these kinds of cases. However, it should be noted that the Court also makes clear that any evidence of collusion with the foreign government in "court[ing] legal impediments to production of * * * records * * * would have a vital bearing on justification for dismissal of the action * * *." 357 U.S. at 209.

A principal defect in the above cited Second Circuit decisions is their failure to distinguish between the power to compel disclosure and the impostion of sanctions for noncompliance made in the *Societé* case. Thus, the 10th Circuit recently observed:

"Certain Second Circuit cases arising after *Societé* suggests that a district court should not order production if the order would cause a party to violate foreign law. See *First National City Bank of New York* v. *Internal Revenue Service*, 2. Cir., 271 F. 2d 616, 619; *Ings.* v. *Ferguson*, 2 Cir., 282 F. 2d 149, 152; and *Application of Chase Manhatian Bank*, 2 Cir., 297 F. 2d 611, 613. Compare *United States* v. *First National City Bank*, 2 Cir., 396 F. 2d 897, 900–901. The failure of these cases to recognize the distinction between power to compel discovery and imposition of sanctions for non-compliance has been criticized. See e.g., Note, Discovery of Documents Located Abroad in U.S. Antitrust Litigation, 14 Va. J. Int. L., 747, 753. The importance of this distinction has been recognized. See Wright, Discovery, 35 F.R.D. 39, 81 [. . . the Supreme Court has held that a foreign corporation is in "control" of certain records, and thus may be ordered to produce them, even though the penal laws of the country where it is located limit its ability to satisfy the production order. Societé, etc.; The effect of those laws is considered in determining what sanction to impose for noncompliance with the order rather than regarded as a reason for refusing to order production]; and Restatement, 2d Foreign Relations Law of the United States, § 39 (1), p. 111. See also *Calculta E. Coast of India & Pakistan/U.S.A. Conf.* v. *Federal Maritime Commission*, 130 U.S. App. D.C. 261, 399 F. 2d 994, 998–999, and *American Industrial Contracting, Inc.* v. *Johns-Manville Corp.*, W.D. Pa., 326 F. Supp. 879, 880–881. *Arthur Anderson & Co.* v. *Finesilver*, 546 F. 2d 338, 341–342 (1976)."

In *Trade Development Bank* v. *Continental Insurance Co.*, 469 F. 2d 35 (2d Cir. 1972), the court refused to compel the bank to disclose the identity of its customers in contravention of the Swiss bank secrecy law because such disclosure was unnecessary to petitioner's case. Thus, the court of appeals in describing the trial judge's actions, observed that—

"* * * In pretrial proceedings Judge Pollack upheld the Bank's position on the ground that there was "neither compelling necessity for this information nor potential prejudice to defendent from non-disclosure at this stage of the proceedings,' *since the transcripts of the customers' accounts and the other records giving details as to the transactions about which the Insurer had acquired were adequate to enable it to prepare for trial.*" 469 F. 2d at 40 (emphasis added).

Also,

". . . Judge Pollack concluded that the Swiss law did prohibit such disclosure and decided that as a matter of comity he would therefore not require the Bank to identify the customers whose accounts were involved, *particularly since in his view the identity was not essential to the issue on trial*, which was whether securities transactions had been entered by Salerian in certain customers' accounts in furtherance of his fraudlent scheme." He ruled:

"'But whether the account is known as X or 8044 or John Jones has nothing to do with whether the bonded employee has stolen something or acted dishonestly or fraudulently in connection with that account. The identity of that person is not a relevant issue in the case.'" *Ibid.* (Emphasis added.)

In brief, there was no need to place the Bank in the dilemmal situation of having to choose between the conflicting U.S. and Swiss laws. Appellant had all the information necessary to prosecute his case; the additional information sought did not add in any significant way thereto. Accordingly, the district court judge "decided that as a matter of comity he would * * * not require the Bank to identify [its] customers", *Ibid.*, and, the court of appeals, in affirming, held that the former had not abused his discretion.

Similarly, in *Ings* v. *Ferguson*, 282 F. 2d at 152, the court refused to compel disclosure of business records contrary to Canadian law because (1) under the laws of both the United States and Canada, procedures were available for securing evidence by letters rogatory, and (2) the Canadian banks in question were only witnesses and not parties to the action.

As noted, the Second Circuit decisions are not in strict accord with the leading *Societé* case in two notable particulars: first, they depart from the case-by-case balancing approach implicit in the earlier decision; second, they fail to recognize the distinction made by the Court between the power to compel discovery and the appropriate sanctions for failure to comply.

The drafters of the Restatement of Conflict Laws of Foreign Relations (2d) in 1965 followed *Societé* in rejecting the "exception of illegality under foreign law." Thus, section 39(1) states:

"A state having jurisdiction to prescribe or enforce a rule of law is not precluded from exercising its jurisdiction *solely* because such exercise requires a person to engage in conduct subjecting him to liability under the law of another state having jurisdiction with respect to that conduct." (Emphasis added.)

Recent cases involving the issue of foreign illegality cite the Restatement and utilize its drafters' rationale in resolving these cases. The latter is as follows:

"Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as

"(a) vital national interests of each of the states.

"(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,

"(c) the extent to which the required conduct is to take place in the territory of the other state,

"(d) the nationality of the person, and

"(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state. § 40.

The 2d Circuit in *United States* v. *First National City Bank*, 396 F. 2d at 901, 902, gave great weight to the Restatement in holding that possible civil liability under the "bank secrecy law" of Germany was not an excuse for failing to comply with a discovery order. Accordingly, both the bank and its vice president were held in civil contempt. In assessing the "vital interests of each of the states", the court emphasized the importance to the United States of effective antitrust enforcement.

"The important interest of the United States in the enforcement of the subpoena warrants little discussion. The Federal Grand Jury before which Citibank was summoned is conducting a criminal investigation of alleged violations of the antitrust laws. *These laws have long been considered cornerstones of this nation's economic policies, have been vigorously enforced and the subject of frequent interpretation by our Supreme Court.* We would have great reluctance, therefore, to countenance any device that would place relevant information beyond the reach of this duly impaneled Grand Jury or impede or delay its proceedings. Judge Learned Hand put the issue in perspective many years ago: 'The suppression of truth is a grievous necessity at best, more especially where as here the inquiry concerns the public interest: it can be justified at all only where the opposing private interest is supreme.' *McMann* v. *S.E.C.* 87 F. 2d 377, 378, 109 A.L.R. 1445 (2d Cir. 1937), *cert. denied*, *McMann* v. *Engle*, 301 U.S. 684, 57 S. Ct. 785, 91 L. Ed. 1342 (1937). 396 F. 2d at 903." (Emphasis added.)

The 2d Circuit rejected as a "gross simplification" the distinction between consequent criminal and civil penalties in compelling discovery contrary to foreign law. "We are not required to decide whether penalties must be under the criminal law to provide a legally sufficient reason for noncompliance with a subpoena; but, it would seem unreal to let all hang on whether the label 'criminal' were attached to the sanction and to disregard all other factors. In any event, even were we to assume *arguendo* that in appropriate circumstances civil penalties or liabilities would suffice, we hold that Citibank has failed to provide an adequate justification for its disobedience of the subpoena" 396 F. 2d at 902.

Although the court gave considerable weight to such factors as the likely availability of other remedies to the aggrieved German clients and the possibility that the bank might have a good defense under German law, it concluded that—

"* * * Whatever one may think of requiring disclosure of records of a German corporation deposited in a bank in Germany, surely an American corporation cannot insulate itself from a federal Grand Jury investigation by entering into a contract with an American bank abroad requiring secrecy.

A similar result was reached in *American Industrial Contr., Inc.* v. *Johns-Manville Corp.*, 326 F. Supp. 879 (W.D. Pa. 1971), where it was held that notwithstanding the provision of Quebec law against sending any document, resumé or digest of any document of a business concern, the effective enforcement of U.S. antitrust laws required wholly owned Canadian subsidiaries of the American corporation to answer certain interrogatories.

In describing the Quebec law, the court said:

"* * * this legislation provides that no person shall send out of the province any document or resumé or digest of any document of a business concern. The prohibition does not apply to removal of documents to the principal or head office or to an affiliated company in the ordinary course of business. The statute is not self-enforcing but requires a petition by the Attorney General to a district judge for an order requiring the documents not to be sent out of the province." 326 F. Supp. at 880.

Although uncertain as to the reason for the Quebec law, the court nevertheless—

"* * * agree[d] with the plaintiff's position that in view of the fact that this action involves the anti-trust laws of the United States which are a matter of important public policy to the United States...." Ibid.

Both *Société* and *United States* v. *First National City Bank* were cited as precedents for the court's decision.

"The court finds support for its position in requiring these interrogatories to be answered in *Société Internationale* v. *Rogers*, 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 1255. It was pointed out in the case that the respondent corporation was in a most advantageous position to plead with its own sovereign for relaxation of the laws preventing it from giving the information.

"We find further support for our position in the case of *United States* v. *First National City Bank*, 396 F. 2d 897 (2d Cir. 1968) wherein it was held that with respect to international law, the position of the American courts was as follows:

"'In any event, under the principles of international law, "A state having jurisdiction to prescribe or enforce a rule of law is not precluded from exercising its jurisdiction *solely* because such exercise requires a person to engage in conduct subjecting him to liability under the law of another state having jurisdiction with respect to that conduct." Restatement (2d), Foreign Relations Law of the United States § 39(1) (1965), (emphasis supplied.) 396 F. 2d at 901.

"The court further pointed out that the antitrust laws have long been a cornerstone of this nation's economic policies and the securing of information in a suit involving them should not be frustrated if it was at all possible to secure the information by any means." *Ibid.*

Paying appropriate deference to matters of international relations between the United States and Canada, the court nevertheless concluded that a provincial law is not the kind of legislation usually accorded comity.

". . . The province of Quebec is not a State within the meanings of the doctrines of international law. These doctrines only apply to nations in the international sense such as the United States and Canada." 326 F. Supp. at 881.

In accord with the foregoing decisions regarding the overriding policy of the United States in antitrust enforcement notwithstanding competing foreign state interests is *Joseph Muller Corp., Zurich* v. *Societe Anonyme de Gerance*, 451 F. 2d 727, 729 (2d Cir. 1971).

See also, *United States* v. *Frank*, 494 F. 2d 145, 156 (2d Cir. 1974) where it is stated that—

"* * * no principle of accommodation requires the United States to seal the lips of American citizens testifying to facts within their knowledge concerning activities of other Americans in a foreign country as part of a scheme to violate American criminal law, simply because that country chooses to throw a veil of secrecy around bank accounts except insofar as their courts see fit to lift it."

In *Arthur Andersen & Co.* v. *Finesilver*, 546 F. 2d 338 (10 Cir. 1976), the court of appeals held that the district court did not abuse its power in requiring discovery of documents even though the production of such documents violated Swiss nondisclosure laws. The court declared: "Foreign law may not control local law. It cannot invalidate an order which local law authorizes." 546 F. 2d 342.

In *In re Grand Jury Proceedings*, 532 F. 2d 404 (5th Cir. 1976), the court held that a nonresident bank official could be subpoenaed while in the United States and required to testify regarding possible tax violations even though the very act of testifying would subject him to criminal prosecution for violating the bank secrecy laws of the country of his residence. While expressing sympathy for the petitioner's dilemma and stating that "courts and legislatures should take every reasonable precaution to avoid" such situations, the court nevertheless could not "acquiesce in the proposition that United States criminal investigations must be thwarted whenever there is conflict with interests of other States." 352 F. 2d at 410. As in all of the recent cases the court relied heavily on the Restatement.

With respect to petitioner's assertion that the subpoena compelling his testimony violated the 5th Amendment protection against self-incrimination, the court stated:

"* * * This subpoena is not an attempt to elicit information from Field which will later be used against him in a criminal case. The Fifth Amendment simply is not pertinent to the situation where a foreign state makes the act of testifying a criminal offense." 532 F. 2d at 407.

Accordingly, the court found that requiring the petitioner to testify violated neither the constitution nor international comity.

It is obvious from the foregoing that foreign illegality will not in and of itself justify disobeying a subpoena calling for the production of documents. The Restatement position requires a balancing of several factors in determining whether the lex fori or the lex sitae will prevail. As respects the matter of the competing nations' interest, the courts point out that the antitrust laws have long been a cornerstone of this Nation's economic policies and the securing of information in a suit involving them should not be frustrated if it is at all possible to secure that information by any means.

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